14-1453

No. ____

In the Supreme Court of the United States

PRIESTS FOR LIFE, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The contraceptive services mandate of the Patient Protection and Affordable Care Act requires Petitioner Priests for Life, a non-exempt religious employer, and its directors to affirmatively authorize and facilitate coverage for contraception, sterilization, abortifacients, and related education and counseling for the participants and beneficiaries of Priests for Life's healthcare plan in direct violation of Petitioners' sincerely held religious beliefs.

The question presented is whether the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious organizations violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*

PARTIES TO THE PROCEEDING

The Petitioners are Priests for Life, Father Frank Pavone, Alveda King, and Janet Morana.

The Respondents are United States Department of Health and Human Services; Sylvia Burwell, in her official capacity as Secretary, U.S. Department of Health & Human Services; United States Department of the Treasury; Jacob J. Lew, in his official capacity as Secretary, U.S. Department of the Treasury; United States Department of Labor; and Thomas E. Perez, in his official capacity as Secretary, U.S. Department of Labor (collectively referred to as "Respondents").

RULE 29.6 STATEMENT

Petitioner Priests for Life is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

QUESTION PRESENTED . i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT . ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW . . 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

INTRODUCTION 3

REASONS FOR GRANTING THE PETITION 11

I. The Circuit Courts Are Split on the Application of RFRA in Cases Challenging the Regulations at Issue Here. 11

A. The Circuit Courts Are Split on the "Substantial Burden" Question. . 11

B. The Circuit Courts Are Split on the Application of Strict Scrutiny. . 16

II. The Panel Decided an Important and Unsettled Question of Federal Law that Should Be Settled by This Court. . . . 17

CONCLUSION 25

APPENDIX

Appendix A Opinion and Judgment in the United States Court of Appeals for the District of Columbia Circuit (November 14, 2014) .. App. 1

Appendix B Memorandum Opinion and Order in the United States District Court for the District of Columbia (December 19, 2013) ..... App. 96

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the District of Columbia Circuit (May 20, 2015) .... App. 137

Appendix D Order Granting Motion for Injunction in the United States Court of Appeals for the District of Columbia Circuit (December 31, 2013) . ... App. 192

TABLE OF AUTHORITIES

CASES

Brown v. Entm't Merchants Ass'n,
131 S. Ct. 2729 (2011) 22

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) . . . *passim*

City of Boerne v. Flores,
521 U.S. 507 (1997) 22

Diocese of Cheyenne v. Burwell,
No. 14-8040, 2014 U.S. App. LEXIS 12686 (10th Cir. June 30, 2014) . . 11

Dunn v. Blumstein,
405 U.S. 330 (1972) . . 22

Eternal World Television Network, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.,
756 F.3d 1339 (11th Cir. 2014) . . 11

Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.,
778 F.3d 422 (3d Cir. 2015) . . . 11, 12

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 17

Griswold v. Connecticut,
381 U.S. 479 (1965) 8

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd*,
134 S. Ct. 2751 . . . . . 12, 17

Holt v. Hobbs,
135 S. Ct. 853 (2015) 19, 23, 24

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 12, 15, 16, 22

Little Sisters of the Poor Home for the Aged v. Sebeluis,
134 S. Ct. 1022 (2014) . 18

Priests for Life v. U.S. Dep't of Health & Human Servs.,
772 F.3d 229 (D.C. Cir. 2014) 1, 12

Roman Catholic Archbishop of Wash. v. Sebelius,
19 F. Supp 3d 48 (D.D.C. 2013), *appeal docketed*,
No. 13-5371 (D.C. Cir. 2013). 2

Thomas v. Rev. Bd.,
450 U.S. 707 (1981) *passim*

United States v. Lee,
455 U.S. 252 (1982) . . 21

Univ. of Notre Dame v. Sebelius,
743 F.3d 547 (7th Cir. 2014) 14

Wheaton Coll. v. Burwell,
134 S. Ct. 2806 (July 3, 2014) . 11, 18

STATUTES AND REGULATIONS

26 U.S.C. § 4980D(b)(1) 8

28 U.S.C. § 1254(1) 1

42 U.S.C. § 300gg-13(a)(4) 2

42 U.S.C. §§ 2000bb, *et seq.* . . *passim*

42 U.S.C. § 2000bb-1(a) 1

42 U.S.C. § 2000bb-1(b) 1

75 Fed. Reg. 41,726 (July 19, 2010) 4

77 Fed. Reg. 8725 (Feb. 15, 2012) 5

78 Fed. Reg. 39,870 (July 2, 2013) 5, 6, 7

Patient Protection & Affordable Care Act *passim*

I.R.C. § 6033(a)(3)(A)(i) 5

I.R.C. § 6033(a)(3)(A)(iii) 5

RULES

Sup. Ct. R. 10(a) 3, 11

Sup. Ct. R. 10(c) 3, 17

OTHER AUTHORITIES

Becket Fund, HHS Mandate Information Central, available at http://www.becketfund.org/hhsinformationcentral/ 18

Matthew 27:24 14

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is reported at 772 F.3d 229. The opinion of the district court appears at App. 96 and is reported at 7 F Supp. 3d. 88. The denial of the petition for rehearing en banc appears at App. 137 and is reported at 2015 U.S. App. LEXIS 8326.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 2014. App. 94-95. A petition for rehearing was denied on May 20, 2015. App. 137-38. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability " 42 U.S.C. § 2000bb-1(a). The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at § 2000bb-1(b).

STATEMENT OF THE CASE

The district court rendered judgment in favor of Respondents on December 19, 2013, holding, in relevant part, that Petitioners "have not stated a *prima facie* case under RFRA because they have not alleged a substantial burden on their religious exercise." App. 122.

Petitioners filed an immediate appeal of that decision and an emergency motion for an injunction pending appeal. The motion was granted by the D.C. Circuit on December 31, 2013, enjoining Respondents "from enforcing against [Petitioners] the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court."[1] App. 193.

On November 14, 2014, the D.C. Circuit ruled in favor of Respondents, dismissing the case. App. 1-95. The panel held, in relevant part, that Petitioners "failed to demonstrate a substantial burden on their religious exercise that would subject the contraceptive coverage requirement to strict judicial scrutiny." App. 48-49. The panel further held that regardless of the burden the "accommodation" imposes upon Petitioners' religious exercise, it nevertheless survives strict scrutiny. App. 72 ("Because the government has used the least restrictive means possible to further its compelling interest, RFRA does not excuse Plaintiffs from their duty under the ACA either to provide the

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[1] In the order granting the injunction, the court of appeals also consolidated the case with *Roman Catholic Archbishop of Washington v. Sebelius*, 19 F Supp 3d 48 (D.D.C. 2013), *appeal docketed*, No. 13-5371 (D.C. Cir. 2013). App. 193.

required contraceptive coverage or avail themselves of the offered accommodation to opt out of that requirement.").

Petitioners filed a timely petition for rehearing en banc, which was denied over the dissent of three circuit judges on May 20, 2015. App. 137-91. This petition follows.

As set forth below, the panel's decision creates a circuit split regarding the application of RFRA. *See* Sup. Ct. R. 10(a). That is, the federal appellate courts are divided over whether the challenged regulations impose a "substantial burden" on a non-exempt, nonprofit religious organization's religious exercise, and if so, whether the government has used the least restrictive means possible to further a compelling interest such that the regulations satisfy strict scrutiny. Indeed, the panel has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Accordingly, the Court should grant this petition.

INTRODUCTION

This case challenges the contraceptive services mandate of the Affordable Care Act and its so-called "accommodation" as applied to non-exempt, religious employers. Petitioners, a Catholic, pro-life advocacy organization and several of its directors, including Father Frank Pavone, are uniquely situated to advance this important challenge on behalf of non-exempt religious employers who object to the contraceptive services mandate on religious grounds. Priests for Life was founded in 1991 to pursue in a singularly-focused way one of the most important religious purposes of the

Catholic Church today: to spread the Gospel of Life to people throughout the world.

The Gospel of Life is an expression of the Catholic Church's position and central teaching regarding the value and inviolability of human life. Contraception, sterilization, and abortifacients are contrary to this teaching, and their use can never be approved, endorsed, facilitated, promoted, or supported in any way. Thus, this challenge goes to the very core of Priests for Life's corporate *raison d'être*.

As set forth in the regulations, the government's stated objective for mandating coverage for contraceptive services is as follows: "By expanding coverage and eliminating cost sharing for recommended preventive services,[2] [the regulations are] expected to increase access to and utilization of these services, which are not at optimal levels today." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010).

Pursuant to the regulations, the singular exemption from the proscriptions of the contraceptive services mandate for organizations that object to it on religious grounds applies only to those organizations that fall

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[2] The "preventive services" required by the challenged mandate include "all Food and Drug Administration approved contraceptive methods [and] sterilization procedures." App. 100. FDA-approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the "morning after pill"), and ulipristal (also known as "ella" or the "week after pill"). Plan B and ella, as well as certain intrauterine devices ("IUD"), can prevent the implantation of a human embryo in the wall of the uterus, thereby causing the embryo's death and thus operating as abortifacients. *See* App. 99-100, 165.

under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). These organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations.

And while Priests for Life is a nonprofit religious organization which exists for the very purpose of opposing what the government seeks to do through the challenged mandate, it does not qualify for the only statutory exemption from the mandate. App. 103-04.

The government rejected considering a "broader exemption" from the challenged mandate because it believes that such an exemption "would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits [of requiring the coverage]." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). According to the government:

> Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care.

77 Fed. Reg. at 8728.

Thus, as the government acknowledges, the ultimate goal of the challenged mandate is to increase the "use of contraceptive services" by compelling access to these services and to ensure that employees, including employees of religious organizations such as Priests for Life, are not "subject" to the employer's religious beliefs regarding such services.

Accordingly, instead of providing an exemption for organizations such as Priests for Life — an exemption that would have addressed Priests for Life's religious objections to the mandate — the government created an "accommodation" scheme for "eligible organizations" — a scheme that has the purpose and effect of advancing the government's objective of "increasing access to and utilization of" contraceptive services by requiring, *inter alia*, coverage of such services for the participants and beneficiaries of the religious organization's healthcare plan so long as they are enrolled in the plan. 78 Fed. Reg. at 39,896.

To qualify for the "accommodation," Priests for Life must affirm that it meets certain eligibility criteria via a "self-certification" form sent to its group health plan issuer or a letter to the Secretary of HHS (the "alternative notice"). App. 34. "An alternative notice to HHS must identify the forms of contraceptive services to which the employer objects, and specify, among other things, the name of the plan, the plan type, and the contact information for the plan issuer or TPA." App. 34.

An insurer that is so notified or receives a copy of the certification must, *inter alia*, provide separate payments for the required contraceptive services for the "eligible organization's" plan participants and

beneficiaries. 78 Fed. Reg. at 39,896. Priests for Life's insurer's obligation—an obligation triggered by Priests for Life's execution and delivery of the certification or notice—to make direct payments for contraceptive services would continue only "for so long as the participant or beneficiary remains enrolled in [Priests for Life's] plan." 78 Fed. Reg. at 39,876.

Additionally, for each plan year to which the "accommodation" applies, Priests for Life's insurer must provide to Priests for Life's plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify, *inter alia*, that the insurer provides coverage for contraceptive services, and it must provide contact information for questions and complaints. 78 Fed. Reg. at 39,897.

Thus, pursuant to this "accommodation," Petitioners will play a direct, central, and indispensable role in facilitating the government's objective of promoting the use of contraceptive services required by the mandate, contrary to Petitioners' religious beliefs. App. 38-39, 110-11.

Consequently, the government mandate directly forces Petitioners to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to Priests for Life's healthcare plan participants and beneficiaries, which is unacceptable because it compels

Petitioners to violate their sincerely held religious beliefs. App. 110-11.

Petitioners' refusal to cooperate with the government's "accommodation" scheme subjects Priests for Life to crippling fines. *See* 26 U.S.C. § 4980D(b)(1). The only other "option" presented by way of this Hobson's choice is for Priests for Life to drop its healthcare coverage altogether, which would also be a violation of Petitioners' religious beliefs and would cause further harm to the individual Petitioners and Priests for Life as an organization. *See* App. 153 (dissent).

In her dissent from the denial for rehearing, Circuit Judge Brown made several initial and important observations. "First, this case is not about denying any woman access to contraception." App. 148 (dissent). The question of whether a woman has a legal right to obtain and use contraception was decided long ago, and nothing about this case calls that issue into question. App. 148 (dissent) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

"Second, this case is about the religious freedom of [Petitioners] and not about the free exercise concerns of the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)." App. 148 (dissent). While this Court indicated that an approach similar to the "accommodation" at issue here was a plausible and thus less restrictive means available for the for-profit corporations, the Court expressly did not decide whether this approach "complies with RFRA for purposes of all religious claims," *id.* at 2782, such as the claim at issue here, App. 148 (dissent). In other words, whether the "accommodation" would satisfy the

religious objections of the plaintiffs in *Hobby Lobby* is irrelevant to this Court's consideration of the religious objections advanced by Petitioners in this case. *See* App. 148 (dissent).

Third, there is nothing "paradoxical" about Petitioners' challenge to "regulatory requirements the government intended as a religious accommodation." App. 148-49 (dissent). The fact that the government labels its regulatory scheme a religious "accommodation" does not make it so. Neither the government's motives nor its labels control the analysis. Rather, the Court asks only whether the government's action operates to place "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see* App. 149 (dissent).

Finally, "this case is not one in which [Petitioners'] 'only harm is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out.'" App. 149 (dissent) (quoting opinion at App. 26). Rather, the government is forcing Petitioners to engage in at least two acts that violate their religious obligations: (1) hiring or maintaining a contractual relationship with a company required, authorized, or incentivized to provide contraceptive coverage to the employees and beneficiaries enrolled in Priests for Life's health plan and (2) filing a self-certification or notification that authorizes such objectionable coverage. This point goes to the heart of the panel's flawed substantial burden analysis—an analysis that

is inconsistent with this Court's precedent and the decisions of other courts of appeals. *See infra* Sec. I.A.

In sum, Petitioners' sincerely held religious beliefs, which prohibit them from cooperating with the government's "accommodation" scheme, are neither trivial nor immaterial, but rather central to the teaching and core moral admonition of the Catholic faith, which requires Petitioners to avoid mortal sin and scandal. As a result, Petitioners object to being forced by the federal government to purchase a healthcare plan that provides access to contraceptives, sterilization, and abortifacients, all of which are prohibited by Petitioners' religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life. Contraception, sterilization, and abortifacients are immoral regardless of their cost. Consequently, the burden imposed upon Petitioners' religious exercise by the challenged mandate is precisely the same whether the government is forcing Petitioners to authorize and facilitate "access to and utilization of" contraceptive services for Priests for Life's plan participants and beneficiaries via submitting a "certification" or notice or via payment to Priests for Life's insurance carrier.

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Are Split on the Application of RFRA in Cases Challenging the Regulations at Issue Here.

A. The Circuit Courts Are Split on the "Substantial Burden" Question.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). This Court has already recognized that the issues presented by this RFRA challenge, including whether the government can force Petitioners to submit documentation they believe makes them morally complicit, have divided the courts of appeals. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (July 3, 2014) (noting that "Circuit Courts have divided on whether to enjoin" the so-called accommodation for "religious nonprofit organizations" (citing Sup. Ct. R. 10(a))); *see also id.* at 2811 (Sotomayor, J., dissenting) (acknowledging disagreement among the circuits).[3] "Such division is a traditional ground for certiorari." *Id.* at 2807 (majority op.).

To begin, the circuit courts are split over the test to apply to determine whether a "substantial burden"

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[3] *Compare, e.g.*, *Diocese of Cheyenne v. Burwell*, No. 14-8040, 2014 U.S. App. LEXIS 12686 (10th Cir. June 30, 2014) (granting injunction pending appeal); *Eternal World Television Network, Inc. ("EWTN") v. Sec'y U.S. Dep't of Health & Human Servs*, 756 F.3d 1339 (11th Cir. 2014) (same), *with Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (denying injunction).

exists for purposes of RFRA. *Compare Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc) (holding that the substantial burden inquiry turns solely on "the intensity of the coercion applied by the government to act contrary to [sincere religious] beliefs"), *aff'd*, 134 S. Ct. 2751; *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (same); *EWTN v. Sec'y U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014) (granting motion for injunction pending appeal), *with Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (declining to analyze coercion and instead assessing "whether the appellees' compliance with the [regulations] does, in fact, . make them complicit in the provision of contraceptive coverage"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (same). This division among the appellate courts is likely to grow in light of the fact that some courts may agree with the three circuit judges who dissented from the denial of rehearing in this case based on the view that the panel's decision is mistaken and inconsistent with this Court's precedent. *See* App. 150 (dissent) (observing that "[t]he panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court"). Indeed, this split exists principally because the courts which have employed the reasoning of the panel in this case have done so contrary to this Court's precedent.[4]

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[4] In *Thomas v. Review Board*, 450 U.S. 707 (1981), for example, this Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a factory that produced armaments, claiming that the production of items that could be

As forcefully stated by Circuit Judge Brown in her dissent from the denial for rehearing in this case:

> In declaring that—contrary to Catholic Plaintiffs' contentions—it would be consistent

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used for war was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. *See id.* at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). Thomas specifically stated that he did not object to the physical work required of him. *Id.* at 711 (observing that Thomas "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms"). In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects of what someone else would do with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id.* at 714 (quoting Thomas at his hearing).

So it is in this case: Petitioners do not object to declaring their objection to contraceptive coverage, such as signing the pleadings in this case and the declarations submitted in support of Petitioners' motion for summary judgment, or even writing an op-ed in a Catholic newspaper. That is, the physical act of signing some statement that is aligned in its purposes and effects with Petitioners' religious beliefs is perfectly consonant with Petitioners' religious faith. But Thomas did object to doing the exact same unobjectionable work when that work resulted in a thing (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.*, the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs, and thus a substantial burden was found. And the same is true in this case. Thus, *Thomas* provides an *a fortiori* argument for a RFRA violation here. *See id.* at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs.").

with the teaching of the Catholic Church for Plaintiffs to comply with the regulations the panel exceeded both the "judicial function and [the] judicial competence." *Thomas*, 450 U.S. at 716. What amounts to "facilitating immoral conduct," "scandal," and "material" or "impermissible cooperation with evil," *id.*; Slip Op. at 14, are inherently theological questions which objective legal analysis cannot resolve and which "federal courts have no business addressing." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778; *see also id.* (stating "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" is "a difficult and important question of religion and moral philosophy"). The causal connection sufficient to create impermissible "facilitation" in the eyes of a religious group may be very different from what constitutes proximate cause in the common law tradition. *See Univ. of Notre Dame* [*v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014)] (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."). Likewise, where civil authorities may conclude an individual has "wash[ed his] hands of any involvement," Slip Op. at 26, adherents of a faith may examine the same situation and, in their religious judgment, reach the opposite conclusion. Pontius Pilate, too, washed his hands, but perhaps he perceived the stain of complicity remained. *See Matthew* 27:24.

> Under the panel's analysis, it seems no claim of substantial burden may prevail where the religious significance of conduct under scripture as interpreted by a faith tradition differs from the legal significance of that conduct under the laws of the United States as interpreted by federal judges. But RFRA would be an exceedingly shallow—perhaps nonexistent—protection of religious exercise if adherents were only permitted to give the same meaning to their actions or inactions as does the secular law.

App. 155-56 (dissent).

As stated by the Seventh Circuit in *Korte*:

> [T]he judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for [Petitioners] to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Korte, 735 F.3d at 685.

Thus, a proper application of *Hobby Lobby* and *Thomas* compels the conclusion that Petitioners have demonstrated a "substantial burden" to their religious

exercise under RFRA, contrary to the conclusion reached by the panel and other courts of appeals.

B. The Circuit Courts Are Split on the Application of Strict Scrutiny.

In addition to resolving the substantial burden question under RFRA, certiorari is appropriate because the panel's decision on the issue of strict scrutiny creates a split with the Seventh and Tenth Circuits.

In *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), the Seventh Circuit held that the government could employ several less-restrictive means of providing free contraceptive coverage without using the health plans of religious objectors as the means to accomplishing this objective: "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options." *Id.*

The panel in this case rejected such workable alternatives, claiming that they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." App. 26; *but see* App. 160 (dissent) ("The government has pointed to no evidence in the record demonstrating its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage.").

The panel's decision also conflicts with the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc), in which the court held that the government's goal of providing contraceptive coverage to employees cannot qualify as a "compelling" interest "because the contraceptive-coverage requirement presently does not apply to tens of millions of people" under its various exemptions. Relying upon this Court's precedent, the Tenth Circuit appropriately held that the regulations "'cannot be regarded as protecting an interest of the highest order when [they] leave[] appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006)). By contrast, the panel held that "[t]he government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans." App. 70.

In sum, because the circuits are split on important questions of federal law that ultimately dictate the outcome of this RFRA challenge, the petition for certiorari should be granted.

II. The Panel Decided an Important and Unsettled Question of Federal Law that Should Be Settled by This Court.

An additional reason for this Court to grant certiorari is because the panel "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

In *Hobby Lobby*, this Court expressly reserved the question presented in this case. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782 & n.40 (discussing the accommodation and clarifying that the Court "do[es] not decide today whether an approach of this type complies with RFRA for purposes of all religious claims"). Similarly, the Court expressly did not decide this question on the merits when granting extraordinary relief to other nonprofit religious organizations. *Wheaton Coll.*, 134 S. Ct. at 2807 ("In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits."); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) ("[T]his order should not be construed as an expression of the Court's views on the merits.").

Moreover, the religious freedom question at issue in this case is exceedingly important, as this Court recognized by granting extraordinary relief to every entity that has requested it under the demanding All Writs Act. *See Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters of the Poor*, 134 S. Ct. at 1022. Indeed, the large number of challenges to the "accommodation" across the country and the results in those cases thus far further confirm the importance of the question presented.[5]

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[5] *See* Becket Fund, HHS Mandate Information Central, available at http://www.becketfund.org/hhsinformationcentral/ (last visited June 2, 2015) (listing the numerous cases challenging the regulations at issue here and noting that injunctions have been granted in many of them).

Accordingly, the manner in which this Court and lower federal courts have treated the issues at stake here confirms that this case raises important questions of federal law that should ultimately be decided by this Court. And this is further highlighted by the fact that the panel's decision runs counter to this Court's decision in *Hobby Lobby* and its recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

As noted, the panel concluded that the challenged regulations do not impose a "substantial burden" on Petitioners' exercise of religion. App. 7. In *Hobby Lobby*, however, this Court held that a "substantial burden" exists when the government "demands" that persons or entities either "engage in conduct that seriously violates their religious beliefs" or else suffer "substantial" "economic consequences." 134 S. Ct. at 2775-76, 2779. When resolving the "substantial burden" question, the Court accepted the plaintiffs' representation that if they "compl[ied] with the [regulations]," "they w[ould] be facilitating" immoral conduct in violation of their religious beliefs. *Id.* at 2759. And the Court found a substantial burden because the penalty for non-compliance was substantial. *Id.* ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

The panel, however, applied a different (and incorrect) "substantial burden" analysis. The panel's ruling on the "substantial burden" issue hinged on its conclusion that complying with the regulations would not "facilitate contraceptive coverage." App. 42-45. But whether the conduct required of Petitioners under the regulations constitutes impermissible facilitation is a religious question that is beyond the judicial function

and its competency to resolve. *See* App. 155 (dissent); *see also Thomas*, 450 U.S. at 716 ("[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

As this Court explained, this issue "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778. In sum, resolution of this fundamental question should be left to religious adherents, not the courts. *See id.*

By asking whether the actions Petitioners are required to take under the challenged regulations "facilitate" contraceptive coverage (a religious question) rather than asking whether the government has placed substantial pressure on Petitioners to take those actions (a legal question), the panel misapplied the substantial burden standard and effectively turned RFRA into "an exceedingly shallow—perhaps nonexistent—protection of religious exercise." *See* App. 156 (dissent).

Here, Petitioners sincerely believe the actions they are required to take to comply with the regulations would impermissibly facilitate immoral conduct and thus make them morally complicit. Specifically, Petitioners sincerely believe that it would be immoral for them to submit the required documentation or to maintain a contractual relationship with any third

party that will provide contraceptive coverage to Priests for Life's health plan participants and beneficiaries. Yet, if Petitioners fail to take those required actions, they will be subject to substantial penalties and other ruinous economic and organizational consequences. Thus, under this Court's reasoning in *Hobby Lobby*, the regulations at issue here impose a "substantial burden" on Petitioners' religious exercise.

The panel's decision also rested in part on its conclusion that the "accommodation" is the least restrictive means of advancing a compelling governmental interest. That is, that the challenged regulations survive strict scrutiny. *See* App. 49-72.

Below, the government asserted only "two compelling governmental interests" "in public health and gender equality." Defs.' Summ. J. Br. (Doc. No. 13). Those "very broadly framed" interests, however, were rejected by this Court in *Hobby Lobby*, which noted that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. The Court similarly rejected the government's supposed interest, set forth *sua sponte* by the panel, in a "sustainable system of taxes and subsidies under the ACA to advance public health." App. 52-53 (citing *United States v. Lee*, 455 U.S. 252 (1982)); *see Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2783-84.

In addition, even if the government did have a compelling interest in providing such coverage, the government could provide it in many alternative ways without forcing religious objectors and their health plans to serve as the delivery vehicles. In *Hobby Lobby*, this Court emphasized that the least-restrictive

means test is "exceptionally demanding." 134 S. Ct. at 2780. And it is well established that "if there are other, reasonable ways to achieve [the government's interests] with a lesser burden on constitutionally protected activity, [it] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Here, the panel held that the government has a compelling interest in ensuring the "seamless[]" provision of contraceptive coverage as part of employee health coverage because "[i]mposing even minor added steps would dissuade women from obtaining contraceptives." App. 68. But avoiding the inconvenience of "minor added steps" to obtain free contraceptive coverage is not a sufficiently compelling interest by any measure to justify a substantial burden on religious liberty. This Court has noted that RFRA requires the government to satisfy "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Indeed, in light of the Court's admonition that the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced," *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011), there is little doubt that the interest in "seamless" access is something much less than compelling.

As noted by the Seventh Circuit, "[t]here are many ways to [provide free contraceptive coverage], almost all of them less burdensome on religious liberty" than forcing religious objectors to participate in the delivery of that coverage. *Korte*, 735 F.3d at 686 (giving examples of alternative ways of delivering such

coverage independently of religious employers' health plans). The Seventh Circuit's argument is particularly strong given this Court's observation in *Hobby Lobby* that "[t]he most straightforward way of [providing contraceptive coverage] would be for the Government to assume the cost" of independently providing "contraceptives to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780.

Petitioners have also offered numerous other alternatives that would require only minor tweaks to existing programs, such as Title X, the Medicaid program, or the Affordable Care Act's insurance exchanges. *See, e.g.*, Joint Supplemental Br. of Appellants/Cross-Appellees at 20. The government, however, has not introduced any evidence showing why these "alternative[s]" are not "viable." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780; *see also id.* at 2781 ("If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.").

Finally, this Court's recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), further supports granting the petition. In *Holt*, the Court held that the government could not force a prisoner to shave his beard in violation of his religious beliefs, relying upon the *Hobby Lobby* substantial burden analysis. Consequently, it makes no difference whether the religious exercise at issue is refraining from shaving

one's beard (*Holt*), refraining from paying directly for contraceptive coverage (*Hobby Lobby*), or refraining from maintaining an objectionable contractual relationship and submitting an objectionable form that effectively authorizes and necessarily facilitates such coverage, as in this case. The relevant and dispositive inquiries are whether the religious exercise is "sincere," and whether the believer "will face serious disciplinary action" unless he forgoes the exercise. *Holt*, 135 S. Ct. at 862. When the government "puts [the plaintiff] to this choice, it substantially burdens his religious exercise," *id.*, as in this case.

Holt also demonstrates why the government fails the "exceptionally demanding" least-restrictive-means test. The government must "not merely explain" its exemption denial (here, the denial of an exemption awarded to thousands of other religious objectors), but must "*prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* at 864 (emphasis added). The Court also found that where a policy, such as the regulations at issue here, is riddled with many exemptions, the government "cannot show" that it passes the least-restrictive-means test. *Id.* at 863-64 (exemptions made the government's position "hard to take seriously").

In the final analysis, the challenged regulations as applied to Petitioners violate RFRA in that they substantially burden Petitioners' religious exercise, and they cannot survive strict scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion and Judgment in the United States Court of Appeals for the District of Columbia Circuit (November 14, 2014) App. 1

Appendix B Memorandum Opinion and Order in the United States District Court for the District of Columbia (December 19, 2013) . . . . App. 96

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the District of Columbia Circuit (May 20, 2015) . . . . . App. 137

Appendix D Order Granting Motion for Injunction in the United States Court of Appeals for the District of Columbia Circuit (December 31, 2013) . . . . . App. 192

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368
Consolidated with 13-5371, 14-5021

[Filed November 14, 2014]

PRIESTS FOR LIFE, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Appeals from the United States District Court for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

Robert J. Muise argued the cause for appellants/cross-appellees Priests For Life, et al. *Noel J. Francisco* argued the cause for appellants/ cross-appellees Roman Catholic Archbishop of Washington, et al. With them on the briefs were *Eric Dreiband* and *David Yerushalmi*.

Kimberlee Wood Colby was on the brief for *amici curiae* The Association of Gospel Rescue Missions, et al. in support of cross-appellants/cross-appellees.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees/cross-appellants. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, and *Alisa B. Klein* and *Adam C. Jed*, Attorneys.

Martha Jane Perkins was on the brief for *amici curiae* National Health Law Program, et al. in support of appellees/cross-appellants.

Marcia D. Greenberger and *Charles E. Davidow* were on the brief for *amici curiae* The National Women's Law Center, et al. in support of appellees/cross-appellants.

Ayesha N. Khan was on the brief for *amici curiae* Americans United for Separation of Church and State, et al. in support of appellees/cross-appellants.

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: These consolidated cases present the question whether a regulatory accommodation for religious nonprofit organizations that permits them to opt out of the contraceptive coverage requirement under the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13(a)(4), itself imposes an unjustified substantial burden on Plaintiffs' religious exercise in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* Plaintiffs'

principal claim is that the accommodation does not go far enough. They believe that, even if they opted out, they would still play a role in facilitating contraceptive coverage. They view the regulation as thereby substantially burdening their religious exercise by involving them in what the Plaintiffs and their faith call "scandal," i.e., leading others to do evil. Plaintiffs claim that the government lacks a compelling interest in requiring them to use the specific accommodation the regulations authorize, making the burden unjustified and unlawful. They contend that RFRA gives them a right to exclude contraceptive coverage from their employees' and students' plans without notice, and requires that the government be enjoined from implementing the contraceptive coverage requirement.

* * *

As a consequence of a period of wage controls after World War II during which employers created new fringe benefits, the majority of people in the United States with health insurance receive it under plans their employers arrange through the private market. Congress chose in the ACA not to displace that basic system. It sought instead to expand the number of Americans insured and to improve and subsidize health insurance coverage, in part by building on the market-based system of employer-sponsored private health insurance already in place. The contraceptive coverage requirement and accommodation operate through that system.

The regulations implementing the ACA and its Women's Health Amendment impose a range of standard requirements on group health plans,

including that they cover contraceptive services prescribed by a health care provider without imposing any cost sharing on the patient. The contraceptive coverage requirement derives from the ACA's prioritization of preventive care, and from Congress' recognition that such care has often been modeled on men's health needs and thus left women underinsured. As discussed below, Congress included the Women's Health Amendment in the ACA to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services, including consultations, prescriptions, and procedures relating to contraception. The medical evidence prompting the contraceptive coverage requirement showed that even minor obstacles to obtaining contraception led to more unplanned and risky pregnancies, with attendant adverse effects on women and their families.

Some employers, including the Catholic nonprofits in this case, oppose contraception on religious grounds. The Catholic Church teaches that contraception violates God's design because the natural and non-sinful purpose of sex is to conceive a child within a marriage: Plaintiff Priests for Life, quoting the Papal Encyclical *Humanae Vitae*, declares that "'any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means'—including contraception and sterilization—is a grave sin." J.A. 49. In the view of the Catholic Church expressed through *Humanae Vitae*, contraception enables the separation of sex from reverence for the sexual partner, the understanding that sex makes

children, and the imperative of deep commitment to marriage and family.

The Catholic Church itself is exempt from the contraceptive coverage requirement, but Catholic nonprofits have a long and broad history of service that goes far beyond worship or proselytizing. Nationally, Catholic hospitals, clinics, universities, schools, and social services groups provide many services that are not inherently religious. Catholic-identified nonprofits employ and enroll as students millions of adults, not all of whom are co-religionists or share the Catholic Church's religious opposition to contraception.

Faced with an employer-based health insurance system, forceful impetus to require coverage of contraceptive services, and religious opposition by some employers to contraception, the government sought to accommodate religious objections. As detailed below, the ACA's implementing regulations allow religious nonprofits to opt out of including contraception in the coverage they arrange for their employees and students. The regulations assure, however, that the legally mandated coverage is in place to seamlessly provide contraceptive services to women who want them, for whom they are medically appropriate, and who personally have no objection to using them.

The regulatory opt out works simply: A religious organization that objects on religious grounds to including coverage for contraception in its health plan may so inform either the entity that issues or administers its group health plan or the Department of Health and Human Services. Delivery of the requisite notice extinguishes the religious organization's obligation to contract, arrange, pay, or refer for any

coverage that includes contraception. The regulations then require group health plan insurers or administrators to offer separate coverage for contraceptive services directly to insured women who want them, and to inform beneficiaries that the objecting employer has no role in facilitating that coverage.

Plaintiffs, the Roman Catholic Archbishop of Washington and nonprofits affiliated with the Catholic Church, arrange for group health coverage for their employees and students. Plaintiffs oppose the ACA's contraceptive coverage requirement on religious grounds and do not want to provide the requisite contraceptive coverage. Instead of taking advantage of the accommodation, Plaintiffs filed suit to challenge it as a violation of their religious rights.

Plaintiffs' principal claim arises under RFRA. Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (internal quotation marks omitted). Congress sought to reinstate as a statutory matter the pre-*Smith* free exercise standard. Under RFRA, the federal government may not "substantially burden" a person's religious exercise—even where the burden results from a religiously neutral, generally applicable law that is constitutionally valid under *Smith*—unless the imposition of such a burden is the least restrictive means to serve a compelling governmental interest.

The contraceptive coverage opt-out mechanism substantially burdens Plaintiffs' religious exercise, Plaintiffs contend, by failing to extricate them from providing, paying for, or facilitating access to contraception. In particular, they assert that the notice they submit in requesting accommodation is a "trigger" that activates substitute coverage, and that the government will "hijack" their health plans and use them as "conduits" for providing contraceptive coverage to their employees and students. Plaintiffs dispute that the government has any compelling interest in obliging them to give notice of their wish to take advantage of the accommodation. And they argue that the government has failed to show that the notice requirement is the least restrictive means of serving any such interest.

We conclude that the challenged regulations do not impose a substantial burden on Plaintiffs' religious exercise under RFRA. All Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state. Religious nonprofits that opt out are excused from playing any role in the provision of contraceptive services, and they remain free to condemn contraception in the clearest terms. The ACA shifts to health insurers and administrators the obligation to pay for and provide contraceptive coverage for insured persons who would otherwise lose it as a result of the religious accommodation.

Even if, as Plaintiffs aver, we must take as dispositive their conviction that the accommodation involves them in providing contraception in a manner that substantially burdens their religious exercise, we would sustain the challenged regulations. A confluence of compelling interests supports maintaining seamless application of contraceptive coverage to insured individuals even as Plaintiffs are excused from providing it. That coverage offers adults and children the benefits of planning for healthy births and avoiding unwanted pregnancy, and it promotes preventive care that is as responsive to women's health needs as it is to men's. The accommodation requires as little as it can from the objectors while still serving the government's compelling interests. Because the regulatory opt-out mechanism is the least restrictive means to serve compelling governmental interests, it is fully consistent with Plaintiffs' rights under RFRA. We also find no merit in Plaintiffs' additional claims under the Constitution and the Administrative Procedure Act.

I. Background

A. The ACA & Accommodation

The ACA requires group health plans, including both insured and self-insured employer-based plans, to include minimum coverage for a variety of preventive health services without imposing cost-sharing requirements on the covered beneficiary.[1] 42 U.S.C.

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[1] An employer "self-insures" if it bears the financial risk of paying its employees' health insurance claims (as opposed to contracting with an insurance company to provide coverage and bear the associated financial risk). Many "self-insured" employers hire third-party administrators ("TPAs") to perform administrative

§ 300gg-13(a); *see also id.* § 300gg-91(a) (defining "group health plan"); 45 C.F.R. § 147.131(c)(2)(ii) (cost-sharing includes copayments, coinsurance, and deductibles). In view of the greater preventive health care costs borne by women, the Women's Health Amendment in the ACA specifically requires coverage for women of "such additional preventive care and screenings . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4).

To determine which preventive services should be required, the Health Resources and Services Administration ("HRSA"), a component of HHS, commissioned a study from the independent Institute of Medicine ("IOM" or "Institute"). The Institute is an arm of the National Academy of Sciences established in 1970 to inform health policy with available scientific information. In reliance on the work of the Institute, HRSA established guidelines for women's preventive services that include any "[FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling." Health Resources & Servs. Admin., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/, *quoted in* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

The three agencies responsible for the ACA's implementation—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, the

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functions, such as developing provider networks and processing claims. *See generally* Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

"Departments")—issued regulations requiring coverage of all preventive services contained in the HRSA guidelines, including contraceptive services. *See* 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury). The Departments determined that contraceptives prevent unintended pregnancies and the negative health risks associated with such pregnancies; they "have medical benefits for women who are contraindicated for pregnancy," and they offer "demonstrated preventive health benefits . . . relating to conditions other than pregnancy . . ." 77 Fed. Reg. at 8,727 Inadequate coverage for women not only fails to protect women's health, but "places women in the workforce at a disadvantage compared to their male co-workers." *Id.* at 8,728. Providing contraceptive coverage within the preventive-care package, the Departments observed, supports the equal ability of women to be "healthy and productive members of the job force." *Id.* Because of the importance of such coverage, and because "[r]esearch . . shows that cost sharing can be a significant barrier to effective contraception," the Departments included contraceptive coverage among the services to be provided without cost sharing. *Id.*

Objections by religious nonprofits to the use of contraception, and to arranging health insurance for their employees that covers contraceptive services, prompted the Departments to create two avenues for religious organizations to exclude themselves from any obligation to provide such coverage. Those avenues track a longstanding and familiar distinction between houses of worship (e.g., temples, mosques, or churches) and religious nonprofits (e.g., schools, hospitals, or

social service agencies with a religious mission or affiliation). First, in order to "respect[] the unique relationship between a house of worship and its employees in ministerial positions," the Departments categorically exempted "religious employers," defined as churches or the exclusively religious activities of any religious order, from the contraceptive coverage requirement.[2] 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *see* 45 C.F.R. § 147.131(a). Second, the Departments created a mechanism for nonprofit "eligible organizations," i.e., groups that are not houses of worship but nonetheless present themselves as having a religious character, to opt out of having to "contract, arrange, pay, or refer for [contraceptive] coverage." 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). This opt-out mechanism was designed to dissociate the objecting organizations from contraceptive coverage while ensuring that the individuals covered under those organizations' health plans—people not fairly presumed to share the organizations' opposition to contraception or to be co-religionists—could obtain coverage for contraceptive services directly through separate plans from the same plan providers. *See id.* at 39,874. Plaintiffs challenge this second mechanism, which the regulations refer to as the "accommodation."

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[2] An organization qualifies as a "religious employer" under the regulations if it is "organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). Those provisions, in turn, refer to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

The government designed the accommodation to avoid encumbering Plaintiffs' sincere religious belief that providing, paying for, or facilitating insurance coverage for contraceptives violates their religion, but the government sought at the same time to preserve unhindered access to contraceptives for insured individuals who use them. Many religiously affiliated educational institutions, hospitals, and social-service organizations have taken advantage of the accommodation, and courts of appeals have uniformly sustained it against challenges under RFRA and the Constitution. *See Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) *petition for cert. filed* (Oct. 3, 2014) (No. 13-3853).

B. The Plaintiff Nonprofits Offer Health Insurance in Various Ways

Plaintiffs are eleven Catholic organizations that employ both Catholics and non-Catholics and provide a range of spiritual and charitable services in the Washington, D.C. area.[3] They fall into four categories that differ in ways that affect how the accommodation applies to them, and that are thus relevant to some aspects of our analysis.

First, the Roman Catholic Archbishop of Washington (the "Archdiocese"), a corporation sole, is part of the Catholic Church. It provides pastoral care

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[3] Father Frank Pavone, Alveda King, and Janet Morana, employees of Plaintiff Priests for Life, are also individually Plaintiffs in this action. We refer to them, along with the organization, collectively as "Priests for Life" or the "*Priests for Life* Plaintiffs."

and spiritual guidance to nearly 600,000 Catholics. It is undisputed that the Archdiocese itself is a religious employer and thus is categorically exempt from the requirement to include coverage for contraceptive services for its employees in its self-insured health plan. The Archdiocese operates a self-insured health plan that is considered a "church plan." Church plans are exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), which regulates private, employer-sponsored benefit plans, including health insurance plans. *See* 29 U.S.C. § 1002(33) (defining "church plan"); *id.* at § 1003(b)(2) (exempting church plans from ERISA); *see generally id.* § 1001 *et seq.* (governing employee benefit plans). The ACA amended ERISA by establishing new requirements for large group health plans and insurers, but the church's provision of benefits to its employees via its church plan is exempt from ERISA, which distinguishes the Archdiocese's claims here from those of the other Plaintiffs. The Archdiocese need not submit any written notice in order to be exempt, and the employees of the Archdiocese are not entitled to contraceptive coverage under the ACA. The Archdiocese nonetheless participates as a Plaintiff in this case in its role as the sponsor of the church plan that some of the other Plaintiffs also use to provide insurance to their employees—a role that the Archdiocese contends makes it complicit in providing them with contraceptive coverage.

The remaining Plaintiffs are all religious nonprofits. It is undisputed that, under the government's regulations, each is eligible for the accommodation, but not the exemption extended to houses of worship.

Comprising the second of the four categories are the so-called "church-plan Plaintiffs," nonprofits affiliated with the Archdiocese that provide educational, housing, and social services to the community and arrange for health insurance coverage for their employees through the Archdiocese's self-insured plan.[4]

Plaintiff Thomas Aquinas College falls under a third category. It also self-insures. It offers its employees health insurance coverage through an organization called the RETA trust, which oversees an ERISA-covered plan set up by the Catholic bishops of California and run by a third-party administrator ("TPA"). The parties agree that the College's plan is not exempt from ERISA as a church plan.

In the fourth category are those Plaintiffs that provide insurance coverage through group health insurance plans they negotiate with private insurance companies. Catholic University of America offers its students and employees health insurance through two separate group insurance plans offered by AETNA and United Healthcare. Priests for Life, a religious nonprofit that encourages clergy to emphasize the value and inviolability of human life, also provides its employees with health insurance through a group insurance plan offered by United Healthcare.

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[4] The church-plan Plaintiffs are the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., and the Catholic Information Center, Inc.

It is undisputed that Plaintiffs all sincerely believe that life begins at conception and that contraception is contrary to Catholic tenets.[5] Priests for Life, for example, was founded to spread the Gospel of Life, which "affirms and promotes the culture of life and actively opposes and rejects the culture of death." Pls.' Br. 11. Catholic doctrine prohibits "impermissible cooperation with evil," and thus opposes providing access to "contraceptives, sterilization, and abortion-inducing products," which the Church views as "immoral regardless of their cost." *Id.* at 12. The specific acts to which Plaintiffs object are "provid[ing], pay[ing] for, and/or facilitat[ing] access to contraception," any of which they believe would violate the Catholic Church's teachings. *Id.* at 15.

In the past, in accordance with their religious beliefs, Plaintiffs have offered health care coverage to their employees[6] that excluded coverage for "abortion-inducing products, contraception [except when used for non-contraceptive purposes], sterilization, or related counseling." *Id.* at 16. They structured the coverage in a variety of ways, including through self-insured health plans and group health plans, which they directed to exclude all contraceptive services. Plaintiffs object to the contraceptive coverage

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[5] For ease of reference, we refer to contraception, sterilization, and related counseling services as "contraception" or "contraceptive services."

[6] Throughout this opinion we discuss Plaintiffs' "employees." We use this term to refer to all individuals covered by Plaintiffs' insurance plans, including employees, students, and other beneficiaries, such as covered dependents.

requirement and the accommodation's opt-out mechanism because, they assert, the accommodation fails adequately to dissociate them from the provision of contraceptive coverage and, by making them complicit with evil, substantially burdens their religious exercise in violation of RFRA. In particular, they contend that the regulations, by requiring the plans or TPAs with which they contract to provide the coverage, effectively require Plaintiffs to facilitate it.

C. Procedural History

Plaintiffs brought two separate suits that proceeded on parallel tracks in district court. The *Priests for Life* Plaintiffs filed their complaint in August 2013 and promptly moved for a preliminary injunction. They challenged the contraceptive coverage requirement and the accommodation as an unjustified substantial burden on their religious exercise in violation of RFRA and raised a variety of constitutional challenges under the Speech and Religion Clauses of the First Amendment and the Equal Protection Clause of the Fifth Amendment.

The district court considered Plaintiffs' request for a preliminary injunction together with the merits, granted the government's motion to dismiss the complaint for failure to state a claim, and denied as moot the parties' cross-motions for summary judgment. Reasoning that "[t]he accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party—namely the issuer—and Priests for Life plays no role in that activity," the court held that the *Priests for Life* Plaintiffs failed to show a substantial burden on their religious exercise. *Priests for Life v. U.S. Dep't of*

Health & Human Servs., 7 F Supp. 3d 88, 102 (D.D.C. 2013). The court also rejected each of Priests for Life's constitutional claims. *Id.* at 104-111.

The remaining Plaintiffs—the Archdiocese, Thomas Aquinas College, Catholic University of America, and the church-plan Plaintiffs (referred to collectively as the "*RCAW* Plaintiffs")—filed their complaint and moved for a preliminary injunction in September 2013, challenging the accommodation under RFRA and the First Amendment. The *RCAW* Plaintiffs further claimed that the government's implementation of the regulations violates the APA, including by adopting an erroneous interpretation of the "religious employer" categorical exemption that precludes the church-plan Plaintiffs from qualifying for it. They also claimed in supplemental briefing that the interim final rule was invalidly promulgated without notice and comment.[7] The *RCAW* case was assigned to a different district judge who also consolidated proceedings on the preliminary injunction and the merits, but who granted in part and denied in part the parties' cross-motions for summary judgment.

The court rejected Catholic University's RFRA claim and granted that of Thomas Aquinas College. *Roman Catholic Archbishop of Wash. v. Sebelius* (*RCAW*), No. 13-1441, 2013 WL 6729515, at *15-24 (D.D.C. Dec. 20, 2013). The court held that the accommodation did not impose a substantial burden on Catholic University's religious exercise because "the accommodation effectively severs an organization that offers its

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[7] The *RCAW* Plaintiffs abandoned on appeal their other APA claims.

employees or students an insured group health plan from participation in the provision of the contraceptive coverage." *Id.* at *15. The court determined that Thomas Aquinas College was entitled to summary judgment on its RFRA claim, however, because, as the court understood the regulations, "a series of duties and obligations" constituting a substantial burden could fall on the self-insured College if, after the College opted out, its current TPA were to decline to serve as the plan administrator for purposes of the contraceptive coverage requirement.[8] *Id.* at *24. The court granted the government's cross-motion for summary judgment on the other constitutional and APA claims.[9]

All Plaintiffs appealed and sought injunctions pending appeal, while the government cross-appealed

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[8] The court also granted summary judgment to both Thomas Aquinas College and the church-plan Plaintiffs on their challenge to the so-called "non-interference" regulation, which prevented a self-insured organization from seeking to "influence" a TPA. The court concluded that the regulation imposed an unconstitutional content-based limitation that "directly burdens, chills, and inhibits" Plaintiffs' free speech. *RCAW*, 2013 WL 6729515, at *37-38. That regulation has since been rescinded, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014), rendering that claim moot.

[9] The district court believed that, because the Archdiocese is exempt from the contraceptive coverage requirement, it was "not joined in" the RFRA claim, *RCAW*. 2013 WL 6729515, at *8, and that the church-plan Plaintiffs lacked standing to bring such a claim, *id.* at *24-27. The court also concluded that some Plaintiffs lacked standing to raise some of the other claims alleged in the complaint. *See, e.g.*, *id.* at *43-44, 47. To the extent necessary to establish this Court's subject matter jurisdiction, we address standing below.

the rulings in favor of the *RCAW* Plaintiffs. We consolidated the appeals and granted an injunction pending appeal.

II. Standard of Review

Whether claims are decided on a motion to dismiss or for summary judgment, we review the district courts' determinations *de novo*. *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012); *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). A motion to dismiss for failure to state a claim should be granted if the complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

III. Standing

The *RCAW* district court concluded that the church-plan Plaintiffs lack standing to challenge the accommodation. 2013 WL 6729515, at *26. The government does not press that issue on appeal, but we have an independent obligation to confirm our jurisdiction. *See Ams. for Safe Access v. DEA*, 706 F.3d 438, 442 (D.C. Cir. 2013). "[I]n determining whether plaintiffs have standing, we must assume that on the merits they would be successful in their claims." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C.

Cir. 2008) (internal alterations and quotation marks omitted).

Plaintiffs contend that they are injured by the challenged regulations because they are forced to choose among options, each of which, they argue, would require them to violate their sincerely held religious beliefs: They may either directly provide contraceptive coverage to their employees, or pay onerous penalties for failing to include contraceptive coverage in their plans. The government has offered them a third option in the form of the accommodation: exclude contraceptive coverage from their plans. They object to that, too, however, because if they exclude contraceptive coverage from their plans, the regulations require someone else to provide it in a way that they contend amounts to their facilitation of the objected-to coverage. Plaintiffs further claim that they are faced with those impossible choices as a result of the ACA regulations, and that a ruling from this Court invalidating those regulations would redress their injury. As a general matter, the government does not contest that Plaintiffs' claimed injury is legally cognizable and concrete.

In successfully challenging the church-plan Plaintiffs' standing in district court, the government argued that it lacks authority to impose on those particular Plaintiffs the harm of which they complain and that they thus cannot allege sufficient injury to support standing. Specifically, the government contended that it could not require a TPA—the firm the Archdiocese hired to administer its plan and process its claims—to provide contraceptive coverage to the

church-plan Plaintiffs' employees.[10] In those circumstances, the government contended, a legal victory in this case would change nothing.

Whether or not the obligation is enforceable, however, it is undisputed that, if the church-plan Plaintiffs want a religious accommodation, they are legally required to request it through the opt-out process. Like all the other Plaintiffs, the church-plan Plaintiffs allege that their religious beliefs forbid them from availing themselves of the accommodation because doing so would render them complicit in a scheme aimed at providing contraceptive coverage. They thus contend that the burden on their religious exercise is the same as the burden on any Plaintiff whose TPA or insurer provides coverage according to the regulations. Their burdens are equally concrete, even though the asserted burden on the other Plaintiffs is backed by a threat of enforcement against a potentially recalcitrant TPA, whereas the church-plan Plaintiffs' asserted burden is not. Because the regulations require the church-plan Plaintiffs to take an action that they contend substantially burdens their

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[10] That is because church plans (such as the Archdiocese's) are exempt from ERISA, 29 U.S.C. § 1003(b)(2), and ERISA is the only vehicle through which the government may enforce a TPA's obligation to provide contraception coverage under the accommodation. *See* 29 C.F.R. § 2510.3-16(b). The government claimed that, in light of its lack of a governmental enforcement mechanism, the Archdiocese's TPA could not be expected to provide the requisite coverage to the church-plan Plaintiffs' employees. As a result of that regulatory loophole, the district court held that the church-plan Plaintiffs are not injured by either the contraceptive coverage requirement or the requirement that they complete the self-certification as a condition of opting out.

religious exercise, they, like the other Plaintiffs, have alleged a sufficiently concrete injury.[11] *See In re Navy Chaplaincy*, 697 F.3d 1171, 1176-77 (D.C. Cir. 2012) (holding that "policies and procedures" that plaintiff claimed produced future injury on the basis of religious belief were sufficient to confer standing).

The Archdiocese presents a distinct standing question because it is completely exempt from the challenged regulation. It contends that it has a RFRA claim because it sponsors the self-insured plan in which the church-plan Plaintiffs participate. It argues that, despite its own exemption, it faces an impossible choice of either sponsoring a plan that will provide the employees of the church-plan Plaintiffs with access to contraceptive services, or no longer extending its plan to those entities, leaving them exposed to penalties if they do not contract with another provider that will provide the coverage. The first option, in its view, substantially burdens its sincerely held religious beliefs in violation of RFRA, and the second option allows the government to interfere with what it casts as its internal operations, in violation of the Religion Clauses of the First Amendment. Our holding that the church-plan Plaintiffs have standing also supports the

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[11] Two of the church-plan Plaintiffs, Catholic Information Center and Don Bosco, have fewer than 50 employees and therefore are not subject to the ACA's requirement that employers provide their employees with health insurance. *See* 26 U.S.C. § 4980H(a), (c)(2). We need not address whether that affects their standing, however, because the presence of other Plaintiffs with standing is sufficient to satisfy Article III. *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

Archdiocese's claim of redressable injury adequate to support its standing to sue.[12]

IV. RFRA Claim

The claim that lies at the heart of this case is Plaintiffs' RFRA challenge to the accommodation. RFRA provides that the federal government may not "substantially burden" a person's religious exercise, even if the burden results from a rule that applies generally to religious and non-religious persons alike, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter. Where a law does impose a substantial burden, Congress has instructed that "we must return to 'the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).'" *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008) (quoting 42 U.S.C. § 2000bb(b)(1)). Congress directly referenced and incorporated the legal standards the Supreme Court used in its pre-*Smith* line of cases in RFRA. Constitutional free exercise cases that predate *Smith* accordingly remain instructive when determining RFRA's requirements. *See id.* at 678-80.

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[12] Because the Archdiocese's RFRA claim derives from its sponsorship of a plan that also insures employees of the church-plan Plaintiffs, the Archdiocese's claim rises and falls with that of the church-plan Plaintiffs and so is not separately analyzed below.

We pause at the outset to make some general observations about the contours of Plaintiffs' claims. First, Plaintiffs' case is significantly different from the recent, successful Supreme Court challenge brought by for-profit, closely-held corporations in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There, the Court concluded that, *in the absence of any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the religious exercise of for-profit corporations because those plaintiffs were required either to provide health insurance coverage that included contraceptive benefits in violation of their religious beliefs, or to pay substantial fines. *Id.* at 2775-76. A critical difference here is that the regulations already give Plaintiffs the third choice that the for-profit corporate plaintiffs in *Hobby Lobby* sought: They can avoid both providing the contraceptive coverage and the penalties associated with non-compliance by opting out of the contraceptive coverage requirement altogether.

Plaintiffs contend that, even with the choice to opt out, the regulations leave them with the same "Hobson's choice" as the for-profit corporations in *Hobby Lobby*. In their view, availing themselves of the accommodation requires them to violate their sincerely held religious beliefs just as surely as would providing contraceptive coverage to their employees. But the opt out already available to Plaintiffs is precisely the alternative the Supreme Court considered in *Hobby Lobby* and assumed would not impinge on the for-profit

corporations' religious beliefs even as it fully served the government's interest.[13] *Id.* at 2782.

This case also differs from *Hobby Lobby* in another crucial respect: In holding that Hobby Lobby must be accommodated, the Supreme Court repeatedly underscored that the effect on women's contraceptive coverage of extending the accommodation to the complaining businesses "would be precisely zero." *Id.* at 2760; *see also id.* at 2781 n.37 ("Our decision in these cases need not result in any detrimental effect on any third party."); *id.* at 2782 (extending accommodation to Hobby Lobby would "protect the asserted needs of women as effectively" as not doing so). Justice Kennedy in his concurrence emphasized the same point, that extending the accommodation to for-profit corporations "equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs." *Id.* at 2786. The relief Plaintiffs seek here, in contrast, would hinder women's access to contraception. It would either

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[13] Plaintiffs also have a fourth option under the ACA: ceasing to offer health insurance as an employment benefit, and instead paying the shared responsibility assessment and leaving the employees to obtain subsidized health care coverage on a health insurance exchange. *See* 26 U.S.C. § 4980H. That is permitted by the Act and regulations and might well be less expensive to employers than contributing to employee health benefits. Plaintiffs, however, contend that declining to arrange health insurance benefits for their employees also would injure them because it would be inconsistent with their religious mission and would deny them the recruitment and retention benefits of providing tax-advantaged health care coverage to their employees. *See* Oral Arg. Tr. at 19:5-15; *see also* Pls.' R. Br. 21 n.9; *see generally Hobby Lobby*, 134 S. Ct. at 2776-77 & n. 32. The government has not pressed the point here.

deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere.

Second, Plaintiffs' claim is extraordinary and potentially far reaching: Plaintiffs argue that a religious accommodation, designed to permit them to free themselves entirely from the contraceptive coverage requirement, itself imposes a substantial burden. As the Seventh Circuit put the point, "[w]hat makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." *Notre Dame*, 743 F.3d at 557. As the *Notre Dame* court noted, it is analogous to a religious conscientious objector to a military draft claiming that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then "trigger" the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war. *Id.* at 556.

Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. *Cf. id.* at 556. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion

abhors. *See generally Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (distinguishing between right to avoid being "coerced into violating their religious beliefs" and the lack of right to pursue "spiritual fulfillment according to their own religious beliefs"). "Government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 453.

We now turn to the substance of Plaintiffs' RFRA claims. We first consider their contention that the accommodation imposes a substantial burden on their religious exercise that is cognizable under RFRA. We then analyze the government's claim that any such burden is justified under RFRA because it could not be made any lighter and still serve the government's compelling interests.

A. The Accommodation Does Not Substantially Burden Plaintiffs' Religious Exercise

In our cosmopolitan nation with its people of diverse convictions, freedom of religious exercise is protected yet not absolute. That is true under the heightened standard Congress enacted in RFRA as well as the constitutional baseline set by the Free Exercise Clause. The limitations that prove determinative here are that only "substantial" burdens on religious exercise require accommodation, and that an adherent may not use a religious objection to dictate the conduct of the government or of third parties. This Court explained in *Kaemmerling* that "[a] substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 553 F.3d at 678 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). A burden does not rise

to the level of being substantial when it places "[a]n inconsequential or *de minimis* burden" on an adherent's religious exercise. *Id.* (citing *Levitan v. Ashcroft*, 281 F.3d 1313, 1320-21 (D.C. Cir. 2002)). An asserted burden is also not an actionable substantial burden when it falls on a third party, not the religious adherent. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Plaintiffs' objection rests on their religious belief that "they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church." Pls.' Br. 15. But the regulations do not compel them to do any of those things. Instead, the accommodation provides Plaintiffs a simple, one-step form for opting out and washing their hands of any involvement in providing insurance coverage for contraceptive services.

1. The Court Must Evaluate Assertions of Substantial Burden

The sincerity of Plaintiffs' religious commitment is not at issue in this litigation. Plaintiffs are correct that they—and not this Court—determine what religious observance their faith commands. There is no dispute about the sincerity of Plaintiffs' belief that providing, paying for, or facilitating access to contraceptive services would be contrary to their faith.

Accepting the sincerity of Plaintiffs' beliefs, however, does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs' religious exercise, and to distinguish Plaintiffs' duties from obligations imposed, not on

them, but on insurers and TPAs. Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry into the substantiality of the burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). "[A]lthough we acknowledge that the [plaintiffs] believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on [plaintiffs'] exercise of religion." *Mich. Catholic Conf.*, 755 F.3d at 385; *see also Notre Dame*, 743 F.3d at 558 ("Notre Dame may consider the [self-certification] process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide.").

Our own decision in *Kaemmerling* requires that we determine whether a burden asserted by Plaintiffs qualifies as "substantial" under RFRA. In *Kaemmerling*, a federal prisoner sought to enjoin the Bureau of Prisons under RFRA from collecting a sample of his blood, claiming a religious objection to "DNA sampling, collection and storage with no clear limitations of use." 553 F.3d at 678. We observed that "Kaemmerling's objection to 'DNA sampling and collection'" was not "an objection to the [Bureau] collecting any bodily specimen that contains DNA

material . . . , but rather an objection to the government extracting DNA information from the specimen." *Id.* at 679. We did not simply accept Kaemmerling's characterization of his burden as "substantial," but instead independently evaluated the nature of the claimed burden on his religious beliefs. *See id.* at 678-79. The plaintiff failed to "allege facts sufficient to state a substantial burden on his religious exercise because he [could not] identify any 'exercise' which is the subject of the burden to which he objects." *Id.* at 679. The court acknowledged that "the government's activities with his fluid or tissue sample after the [Bureau] takes it may offend Kaemmerling's religious beliefs," but it rejected the substantial burden contention because "Kaemmerling alleges no religious observance that the DNA Act impedes, [n]or acts in violation of his religious beliefs that it pressures him to perform." *Id.*

In *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), this Court similarly rejected the plaintiffs' formulation of the substantial-burden test as forbidding the government's general application of religiously neutral law where it would impose *any* burden on religiously motivated conduct because doing so would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." As RFRA sponsor Senator Orrin Hatch explained, the Act "does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest " 139 Cong. Rec. 26,180 (1993) (statement of Sen. Hatch).

Under free exercise precedents that RFRA codified, the Supreme Court distinguished between substantial burdens on religious exercise, which are actionable, and burdens that are not. Burdens that are only slight, negligible, or *de minimis* are not substantial. And burdens that fall only on third parties not before the court do not substantially burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *Lyng*, 485 U.S. at 447 (finding it undisputed that the government's action "will have severe adverse effects on the practice of [plaintiffs'] religion," but disagreeing that such burden was "heavy enough" to subject that action to strict scrutiny).

In *Bowen*, a Native American plaintiff brought a free exercise challenge to a statute requiring the state to use his daughter's social security number to process welfare benefits requests. 476 U.S. at 695-96. Roy, the father, believed that the government's use of the social security number of his daughter, Little Bird of the Snow, would serve to "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." *Id.* at 696. The Court rejected Roy's claim on the basis that, rather than complaining about a restriction on his own conduct, Roy sought to "dictate the conduct of the Government's internal procedures." *Id.* at 700. Roy's claim failed because, even though it seriously offended Roy's religious sensibilities, "[t]he Federal Government's use of a Social Security number

for Little Bird of the Snow d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.* at 700-01 (internal quotation marks omitted).

Building on the analysis in *Bowen*, the Supreme Court refused to apply strict scrutiny to the government's land use decision in *Lyng*. 485 U.S. at 450. There, members of Indian tribes claimed that the federal government violated their right to free exercise by permitting timber harvesting and construction on land they used for religious purposes. *Id.* at 441-42. The Court stated that its free exercise jurisprudence "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

According to Plaintiffs, this Court is bound to accept their understanding of the obligations the regulations impose—including their view of the existence and substantiality of any burden on their own religious exercise—because to do otherwise would be tantamount to questioning the sincerity of their beliefs. Indeed, under Plaintiffs' view, we must accept a RFRA claimant's understanding of what the challenged law requires her to do (or to refrain from doing), even if that subjective understanding is at odds with what the law actually requires.[14] Plaintiffs' approach collapses

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[14] Plaintiffs elaborated their position in their responses to a hypothetical posed during oral argument. We posited a situation

the distinction between sincerely held belief and substantial burden. We must give effect to each term in the governing statute, however, including the requirement that only "substantial" burdens on religious exercise trigger strict scrutiny. We cannot accept Plaintiffs' proposal to prevent the court from evaluating the substantiality of the asserted burden.

2. The Accommodation Frees Eligible Organizations from the Contraceptive Coverage Requirement

A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization: The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious

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in which an adherent, similar to the plaintiff in *Thomas*, objected to working in a factory on the grounds that the tools he was manufacturing were being used to support a war effort that his sincere religious beliefs prohibited him from supporting. *See Thomas*, 450 U.S. at 710 (after being transferred to a department that "fabricated turrets for military tanks, [Thomas] quit, asserting that he could not work on weapons without violating the principles of his religion"). Unlike the facts in *Thomas*, however, in our hypothetical, the adherent was not manufacturing tools used for war, but rather farm equipment that had no relationship whatsoever to any military effort. Counsel for both the *Priests for Life* Plaintiffs and the *RCAW* Plaintiffs conceded that, under their view, if the religious objection was to war machinery, not farm tools, a plaintiff who misperceived the facts underlying his challenge would be entitled nonetheless to a determination that requiring him to continue working in a farm tools factory imposed a substantial burden on his religious observance merely because he sincerely believed that it did. Oral Arg. Tr. at 9:3-11:16; 22:16-23:24.

objection in order to be excused from the contraceptive coverage requirement. Once an eligible organization has taken the simple step of objecting, all action taken to pay for or provide its employees with contraceptive services is taken by a third party.

Specifically, the regulations require that, to be eligible for the accommodation, an organization must certify that it has a sincere religious objection to arranging contraceptive coverage.[15] *See* 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(a). The organization opts out under the regulations by affirming that it meets those eligibility criteria via a "self-certification" form sent to its group health plan issuer or TPA, or a letter to the Secretary of HHS (the "alternative notice"). 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(b)(1)(ii); *see also* 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). An alternative notice to HHS must identify the forms of contraceptive services to which the employer objects, and specify, among other things, the name of the plan, the plan type, and the contact information for the plan issuer or TPA.[16] 45 C.F.R. § 147.131(c)(1)(ii); 29 C.F.R.

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[15] The Supreme Court, in *Hobby Lobby*, 134 S. Ct. at 2782, characterized the accommodation HHS designed for eligible organizations as a less restrictive means of serving the government's interest in the contraceptive coverage requirement that should be made available to the closely-held, for-profit religious corporate plaintiffs in that case. The government accordingly is extending the accommodation to such companies. *See* 79 Fed. Reg. at 51,094.

[16] Initially, an eligible organization could only avail itself of the accommodation by completing the self-certification form. The Supreme Court issued an interim order in *Wheaton College v.*

§ 2590.715-2713A(b)(1)(ii)(B). Once an eligible organization avails itself of the accommodation, that organization has discharged its legal obligations under the challenged regulations. *See* 45 C.F.R. § 147.131(c)(1), (e)(2); 29 C.F.R. § 2590.715-2713A(b)(1); 79 Fed. Reg. at 51,094-95.

The accommodation here works in the way such mechanisms ordinarily do: the objector completes the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out. Once the eligible organization expresses its desire to have no involvement in the practice to which it objects, the government ensures that a separation is effectuated and arranges for other entities to step in and fill the gap as required to serve the legislatively mandated regime. Specifically, the regulations:

- require that the group health plan insurer expressly exclude contraceptive coverage from the eligible organization's group health plan,[17] 45 C.F.R. § 147.131(c)(2)(i)(A);

Burwell, 134 S. Ct. 2806 (2014), however, permitting an eligible organization to notify the Secretary of HHS in writing of its objection instead of sending the self-certification directly to the insurer or TPA. *Id.* at 2807. The Departments accordingly issued interim final regulations to authorize opting out using that alternative notice. 79 Fed. Reg. at 51,094-95.

[17] There is no analogous requirement for TPAs because it is the self-insured employer that controls the scope of coverage provided under its plan. Once it has opted out, a self-insured employer has satisfied its legal obligation under the contraceptive-coverage regulations. 29 C.F.R. § 2590.715-2713A(b)(1).

- fully divorce the eligible organization from payments for contraceptive coverage, *see* 45 C.F.R. § 147.131(c)(2); 29 C.F.R. § 2590.715-2713A(b)(2)(i);

- require that the insurer or TPA notify the beneficiaries in separate mailings that it will be providing separate contraceptive coverage, 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d),

- require that the insurer or TPA specify to the beneficiaries in those separate mailings that their employer is in no way "administer[ing] or fund[ing]" the contraceptive coverage. (The regulations include model language for such notice, suggesting that the insurer or TPA specify to employees that "your employer will not contract, arrange, pay, or refer for contraceptive coverage.") 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d); and

- demand separate mailings and accounting on the part of the insurer or TPA, keeping contraceptive coverage separate for all purposes from the eligible organization's plan that exclude it, 45 C.F.R. § 147.131(c)(2)(ii), (d); 29 C.F.R. § 2590.715-2713A(b)(2), (d).

The regulations leave eligible organizations free to express to their employees their opposition to contraceptive coverage. In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing

toward such coverage, and have the providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage.

Plaintiffs' opposition to the consequences of the ACA's Women's Health Amendment, even with the accommodation, amounts to an objection to the regulations' requirement that third parties provide to Plaintiffs' beneficiaries products and services that Plaintiffs believe are sinful. What Plaintiffs object to here are "the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [Plaintiffs] themselves to take." *Notre Dame*, 743 F.3d at 559 (quoting Order at 3, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (Dec. 31, 2013) (Tatel, J., statement) (hereinafter "Emergency Injunctions Order")). But RFRA does not grant Plaintiffs a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties. *See, e.g.*, *Lyng*, 485 U.S. at 452; *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Mich. Catholic Conf.*, 755 F.3d at 388-89; *Notre Dame*, 743 F.3d at 552.

Plaintiffs seek to distinguish *Kaemmerling* and *Bowen* on the ground that, unlike the plaintiffs in those cases, they object to what the regulations require of *them*. But the only action the regulations require of Plaintiffs—completion of the self-certification or alternative notice—imposes a *de minimis*

administrative obligation.[18] To the extent that their objection is to the role of that action in the broader regulatory scheme—a scheme that permits or requires independent coverage providers to take actions to which Plaintiffs object—their challenge is governed by *Kaemmerling* and *Bowen*. As in *Bowen*, even though Plaintiffs' "religious views may not accept this distinction between individual and governmental conduct," the Constitution does "recognize such a distinction." 476 U.S. at 701 n.6. So, too, does RFRA. And just as the plaintiffs in *Bowen* and *Kaemmerling* could not successfully challenge what the government chose to do with their social security numbers or DNA specimens, respectively, Plaintiffs have no RFRA claim against the government's arrangements with others to provide coverage to women left partially uninsured as a result of Plaintiffs' opt out. RFRA does not treat the government requiring third parties to provide contraceptive coverage in the face of an employer's religious disapproval as tantamount to the government requiring the employer itself to sponsor such coverage. *See Mich. Catholic Conf.*, 755 F.3d at 388-89; *Notre Dame*, 743 F.3d at 554-55; *id.* at 559 (quoting Emergency Injunctions Order at 3 (Tatel, J., statement)).

Plaintiffs nonetheless insist that, even with the accommodation, the regulations substantially burden

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[18] Plaintiffs object that characterizing the accommodation as simply filling out a form ignores the meanings that Plaintiffs attach to the form. But the meaning Plaintiffs attach to the form derives from their contention that their completion of the form causes third parties to take action. The error of that contention is discussed more fully *infra* Section IV.A.2.a.

their religious exercise by continuing to require that they play a role in the facilitation of contraceptive use. In particular, they contend that: (1) "signing and submitting the self-certification" or alternative notice "triggers" or "impermissibly facilitates delivery of the objectionable coverage" to the beneficiaries of their health plans; (2) the regulations require "contracting with third parties authorized or obligated to provide the mandated coverage;" and (3) the regulations require "maintaining health plans that will serve as conduits for the delivery of the mandated coverage." Pls.' Br. 12, 18; Pls.' Supp'l Br. 1. Additionally, self-insured Plaintiffs contend that their self-certification expressly and impermissibly authorizes their TPAs to provide contraceptive coverage.

Each of those separate, but related, arguments fails for fundamentally the same reason: Notwithstanding Plaintiffs' contrary contentions, the regulations provide an opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage to which health insurance beneficiaries are entitled, and that fastidiously relieves Plaintiffs of any obligation to contract, arrange, pay, or refer for access to contraception in any way that might constitute a substantial burden on their religious exercise under RFRA.

a. Plaintiffs' Opt-Out Does Not Trigger Contraceptive Coverage

Plaintiffs claim that the requirement that they submit the self-certification to their plan issuers or TPAs, or submit the alternative notice to the government, makes them "authorize" or "trigger" the

provision of the contraceptive coverage they find religiously abhorrent. They characterize the self-certification and alternative notice as "permission slips" for their plan issuers and TPAs to provide contraceptive coverage to Plaintiffs' employees. Pointing to the regulatory requirements of an insurer or TPA after an eligible organization has availed itself of the accommodation, Plaintiffs argue that it is their own act of self-certifying or completing the alternative notice that "confers . . . both the authority and obligation" on the insurance companies and TPAs to provide the objected-to coverage to Plaintiffs' employees. Pls.' Br. 9.

Plaintiffs' "permission slip" argument misstates how the regulations operate. As the Sixth and Seventh Circuits have also concluded, the insurers' or TPAs' obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice. *See Mich. Catholic Conf.*, 755 F.3d at 387; *Notre Dame*, 743 F.3d at 554. The regulations require that "a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage" for a variety of types of preventive care, including the coverage to which Plaintiffs object. 45 C.F.R. § 147.130(a)(1). That obligation exists apart from any action that Plaintiffs take. "'Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to [an eligible organization's] employees, those employees will receive contraceptive coverage from their insurers *even if* [objectors] self-certify—but not *because* [objectors] self-certify.'" *Notre Dame*, 743 F.3d at 559 (quoting

Emergency Injunctions Order at 3 (Tatel, J., statement)).

Indeed, contrary to Plaintiffs' characterization, what the self-certification or alternative notice actually triggers is a series of steps designed to ensure that eligible organizations such as Plaintiffs do *not* contract, arrange, pay, or refer for access to contraceptive services. The regulations fully relieve Plaintiffs from the obligation to provide or pay for contraceptive coverage, and instead obligate a third party to provide that coverage separately.

The illogic of Plaintiffs' "trigger" argument is highlighted by the conscientious objector scenario recounted above. The implication of Plaintiffs' position is that the Selective Service could deny a religious conscientious objector's RFRA claim against calling up the next draftee only if the government's decision to do so survived strict scrutiny. That strikes us as "a fantastic suggestion." *Notre Dame*, 743 F.3d at 556. There, as here, the feature that defeats Plaintiffs' argument is plain: It was the government's selective service draft quota, not the conscientious objector exercising his accommodation right, that determined whether a replacement would be called. So, too, it is the ACA that requires that plan issuers and TPAs fill the resulting gaps, not the opt-out notice. In neither case is the objecting party substantially burdened by, and thus entitled to accommodation from, the sequelae of opting out. Accurately understood, the opt-out mechanism imposes on Plaintiffs only the *de minimis* administrative burden associated with completing the self-certification form or the alternative notice. *See id.* As long as Plaintiffs complete either notice, the

regulations excuse them from any further involvement in providing contraceptive coverage. As discussed above, the beneficiaries receive contraceptive coverage not because Plaintiffs have completed the self-certification or alternative notice, but because the ACA imposes an independent obligation on insurers and TPAs to provide this coverage.

b. Plaintiffs' Contracts with Providers Do Not Authorize or Facilitate Contraceptive Coverage

Plaintiffs further contend that the regulations substantially burden their religious exercise by requiring contraceptive coverage to be provided for their employees and students by the same entities with which Plaintiffs have contracted to provide non-contraceptive health coverage. Once Plaintiffs opt out of the contraceptive coverage requirement, however, contraceptive services are not provided to women because of Plaintiffs' contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception. Plaintiffs' contracts do not in any way authorize or condone the insurers' or TPAs' provision of the coverage. The separate interactions between non-objecting insurance companies and beneficiaries do not substantially burden Plaintiffs' religious exercise, just as third-party actions in other religious-exercise cases have been held not to burden plaintiffs. *See, e.g.*, *Bowen*, 476 U.S. at 699-700; *Kaemmerling*, 553 F.3d at 679; *see also Notre Dame*, 743 F.3d at 552. We do not understand Plaintiffs to contend that RFRA privileges them generally to require that the extra-contractual rights and legal

obligations of individuals and entities with whom they contract conform to Plaintiffs' religious beliefs, nor could they.

c. Plaintiffs' Plans Are Not Conduits for Contraceptive Coverage

Plaintiffs also argue that the regulations substantially burden their religious exercise by permitting their insurance plans to be used as conduits through which their employees receive contraception. Plaintiffs identify a number of acts—such as paying premiums and offering enrollment paperwork—that they contend they must take that ensure that the contraceptive "pipeline" remains open. None of those acts, however, requires Plaintiffs to contract, arrange, pay, or refer for access to contraception. Once Plaintiffs take advantage of the accommodation, they are dissociated from the provision of contraceptive services. The premiums and enrollment paperwork support the provision of health care coverage to which Plaintiffs have no objection—and nothing more.

Plaintiffs contend that their plans remain a conduit for the provision of contraceptives because they are required to pay premiums or fees to entities in charge of the plans that provide contraceptive benefits. The regulations, however, expressly prevent insurers and TPAs from directly or indirectly charging Plaintiffs for the cost of contraceptive coverage and obligate third parties to pay for the contraceptive services. 45 C.F.R. § 147.131(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(b)(2). Therefore, although Plaintiffs are required to pay premiums and fees to their group health plan issuers or TPAs, those entities are legally prohibited from

using Plaintiffs' payments to fund contraceptive services.

Plaintiffs further contend that their plans are used as conduits because, they assert, they must provide their beneficiaries with enrollment paperwork to enable them to participate in a plan that provides coverage for contraceptives, and they must send, or tell their beneficiaries where to send, the enrollment paperwork. Under the regulations, however, the employer has no such obligation. The insurer or TPA is entirely responsible for any paperwork related to contraceptive coverage. The insurer or TPA must provide beneficiaries with notice of the availability of contraceptive coverage, the notice must be separate from any materials distributed in connection with the individual's enrollment in the employer's plan, and the notice must make clear that the employer is not playing any role in the contraceptive coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d).

Plaintiffs also argue that their plans serve as conduits because they must identify their health plan beneficiaries to their insurers or TPAs. No regulation related to the accommodation imposes any such duty on Plaintiffs. *See Mich. Catholic Conf.*, 755 F.3d at 389. Plaintiffs will have necessarily provided their plans or TPAs with the names of employees enrolling in their health care plan so that those individuals may be provided with health care coverage. To the extent that Plaintiffs object to the actions the insurers or TPAs will take after receiving those names, Plaintiffs are objecting to an independent obligation imposed on a third party by the government. As discussed above, RFRA does not protect parties from obligations

imposed on third parties by outside sources. In short, none of the actions that Plaintiffs identify is actually required of them under the regulations, and none of those actions makes their plans conduits for contraceptive coverage.[19]

d. Regulations Specific to the Self-Insured Plaintiffs Do Not Create a Substantial Burden

Finally, the self-insured Plaintiffs object to the regulatory provisions that apply particularly to self-insured organizations. They object that their self-certification forms are what designate their TPAs as the plan administrators for contraceptive benefits under section 3(16) of ERISA and also serve as instruments under which the health plans are operated. *See* 29 C.F.R. § 2510.3-16(b). They argue that the regulations thus put them in the position of facilitating the provision of contraceptives by authorizing the TPAs to take actions they previously could not have taken.

That argument miscasts the regulations, which do not require the self-insured Plaintiffs to name their TPAs as ERISA plan fiduciaries. Plaintiffs submit

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[19] On a related note, Plaintiffs contend that they must refrain from canceling their contract with a third party authorized to provide coverage for contraceptive services and from attempting to influence a third party's decision to provide the coverage for contraception. The government denied that the regulations would require Plaintiffs to refrain from taking either of those actions. Gov. Br. 33-34; Oral. Arg. Tr. at 46:15-48:1. In any event, as discussed *infra* note 28, the regulations have been revised to remove the provision that Plaintiffs alleged so constrained them.

forms to communicate their decisions to opt out, not to authorize TPAs to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to services are made available because of the regulations, not because Plaintiffs complete a self-certification. 29 C.F.R. § 2510.3-16(b); *see Notre Dame*, 743 F.3d at 554-55; 78 Fed. Reg. at 39,880.

The self-insured Plaintiffs raise a parallel objection to the alternative process established by the revised regulations. Under the revised regulations, once the government receives an alternative notice from an eligible organization, the government sends the TPA a notification that will "designate the relevant [TPA] as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the [TPA] would otherwise manage." 79 Fed. Reg. at 51,095; *see also* 29 C.F.R. § 2510.3-16(b). The regulations make the government's notification to the TPA "an instrument under which the plan is operated." 29 C.F.R. § 2510.3-16(b).

The self-insured Plaintiffs contend that the revised regulations thereby violate ERISA because the government lacks authority to name a plan administrator or amend Plaintiffs' plan instruments. Plaintiffs do not contend, however, that the government lacks authority to author a plan instrument or designate a particular writing as a plan instrument, and it is this authority the regulations deploy. Once the government receives the alternative notice, it directs the TPA to cover contraceptive services and, treating its own direction as the new plan instrument, the government names the TPA as the

plan administrator of contraceptive coverage. ERISA expressly permits a plan instrument to name a plan administrator. 29 U.S.C. § 1002(16)(A)(i) (defining "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated").[20] By naming the plan administrator in the plan instrument, the government complies with ERISA. The government's approach does not, contrary to Plaintiffs' contention, amend or alter Plaintiffs' own plan instruments; the government directs only the contraceptive coverage.

The self-insured Plaintiffs also contend that they are required to facilitate access to contraceptive coverage because, if their existing TPAs decline to assume the responsibility to provide contraceptive coverage, the regulations obligate Plaintiffs to take affirmative steps to identify and contract with new TPAs. The district court granted summary judgment for Plaintiff Thomas Aquinas College on this ground. *RCAW*, 2013 WL 6729515, at *24. Upon *de novo* review, we reject Thomas Aquinas's argument as premature. Thomas Aquinas has not made any showing that its TPA has any intention of refusing to provide contraceptive coverage to its employees.[21] Moreover,

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[20] ERISA also states that "in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified," the administrator is "such other person as the Secretary [of Labor] may by regulation prescribe." 29 U.S.C. § 1002(16)(A)(iii).

[21] *See* 29 C.F.R. § 2590.715-2713A(b)(2) ("If a [TPA] receives a copy of the self-certification *and agrees to enter into or remain* in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the [TPA] shall

the government has clarified that, if an eligible organization's existing TPA were to decline to assume responsibility for providing contraceptive coverage, the regulations do not require the eligible organization to identify and contract with a new one. *See* 78 Fed. Reg. at 39,880-81. We believe that clarification requires us to vacate the district court's grant of summary judgment for Thomas Aquinas.

* * *

In sum, RFRA grants Plaintiffs a right to be free of any unjustified substantial governmental burden on their religious exercise. The regulatory requirement that they use a sheet of paper to signal their wish to opt out is not a burden that any precedent allows us to characterize as substantial. It is as a result of the ACA, and not because of any actions Plaintiffs must take, that Plaintiffs' employees are entitled to contraceptive coverage provided by third parties and that their insurers or TPA must provide it; RFRA does not entitle Plaintiffs to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled. A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities. The regulations go to great lengths to separate Plaintiffs from the provision of contraceptive coverage. Plaintiffs have failed to demonstrate a substantial burden on their religious exercise that

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provide or arrange payments for contraceptive services (emphasis added)); 78 Fed. Reg. at 39,880.

would subject the contraceptive coverage requirement to strict judicial scrutiny.

B. The Accommodation Survives Strict Scrutiny

When the parties filed their initial briefs on appeal, the government conceded that this Court's decision in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014), controlled the compelling-interest inquiry here. Gov. Br. 44. In *Gilardi*, we held at the preliminary injunction stage that, while a closely-held, for-profit business corporation was not a "person" whose religious exercise was protected by RFRA, its individual owners had RFRA rights that were injured by application of the contraceptive coverage requirement to their firm. 733 F.3d at 1214-19. Lack of a regulatory accommodation applicable to such religious objectors constituted a substantial burden, and the government failed to establish a compelling interest that justified it. *Id.* at 1219-22.

While this appeal was pending, the Supreme Court vacated *Gilardi* in view of its decision in *Hobby Lobby*. 134 S. Ct. 2902 (2014). The Court also, in *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014), preliminarily enjoined the requirement that a party seeking to opt out use the self-certification form as specified in the regulations. The plaintiff in that case already had notified the government of its eligibility and desire for exemption without using that form, and the Court required HHS to accept that as adequate notice. Because the Court's decisions and a new Interim Final Rule responding to the *Wheaton College* order (*see* 79

Fed. Reg. at 51,092) unsettled the governing law, we requested supplemental briefing.[22]

We directed the parties to brief the implications for this appeal of the intervening legal developments. We specifically requested briefing on the substantial-burden and strict-scrutiny issues, and received such briefing from both parties.

Hobby Lobby's analysis is instructive, even though the substantial-burden and least-restrictive-means questions posed by the lack of any accommodation available to the plaintiffs in *Hobby Lobby* are very different from those presented here, where the government has provided an accommodation. As discussed above, we conclude that the accommodation does not impose a substantial burden on Plaintiffs in this case. *See Mich. Catholic Conf.*, 755 F.3d at 390; *Notre Dame*, 743 F.3d at 554-559. To the extent that the Supreme Court's recent order in *Wheaton College* might be read to signal a different conclusion, analysis of the strict scrutiny question is also called for. The *Hobby Lobby* Court's discussion of the weightiness of the government's interests is in substantial tension with *Gilardi*'s approach to the strict scrutiny analysis. We thus proceed in light of the intervening decisions to analyze whether the accommodation is the least restrictive means to serve a compelling governmental interest.

The challenged regulations seek to ensure timely and effective access to contraception for all women who want it and for whom it is medically appropriate. The

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[22] *See supra* notes 15 & 16.

government contends that the regulations are amply supported because they arise at the intersection of overlapping governmental interests, each of which is compelling: public health, and women's well-being. The government claims an interest in independently assuring seamless contraceptive coverage, regardless of whether the insured woman receives her other health insurance coverage through her (or her family member's) employment at a religious nonprofit that objects to providing it.

The Supreme Court's characterizations of the government's asserted compelling interest and the narrow tailoring of the accommodation were dicta in *Hobby Lobby*. The accommodation was not challenged there; it was only adverted to as a potential remedy for the non-accommodated plaintiffs in that case. As next discussed, however, the Court's characterizations are consistent with our conclusions that (1) the contraceptive coverage requirement—and, specifically, its guarantee for employees whose employers partake of the accommodation—is supported by compelling governmental interests, and (2) it imposes no unnecessary constraints on Plaintiffs' religious exercise.

1. The Government Has Demonstrated Compelling Interests That Support Seamless Provision of Contraceptive Coverage

In promulgating the challenged regulations, the government asserted an interest in supporting women's unhindered, cost-free access to contraceptive services. *See* 78 Fed. Reg. at 39,887-88. The Supreme Court in *Hobby Lobby* assumed, without deciding, that the governmental interest in "guaranteeing cost-free

access" to contraception was "compelling." *Hobby Lobby*, 134 S. Ct. at 2780. Five members of the Court separately signed onto opinions that appear to be more affirmative. Justice Kennedy, concurring, found it "important to confirm" that the "premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786. He noted that the government "makes the case" that the contraceptive coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-86. Justice Ginsburg, writing for four dissenting justices, recounted the government's evidence establishing the importance of contraception to a range of women's health needs, and concluded that contraceptive coverage under the ACA "furthers compelling interests in public health and women's well being." *Id.* at 2799-2800.

There is no simple formula for identifying which governmental interests rank as compelling, but certain touchstones aid our analysis. Interests in public health, safety, and welfare—and the viability of public programs that guard those interests—may qualify as compelling, as may legislative measures to protect and promote women's well being and remedy the extent to which health insurance has not served women's specific health needs as fully as those of men.

The government's asserted compelling interest here, writ large, is in a sustainable system of taxes and subsidies under the ACA to advance public health.

That interest is as strong as those asserted in cases such as *United States v. Lee*, 455 U.S. 252, 258 (1982), and *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699-700 (1989), recognizing governmental interests in broad participation in public tax and benefits systems as sufficiently compelling to outweigh countervailing claims that they unjustifiably burdened religious exercise.

In *Lee*, the Supreme Court held that the government's interest in a nationwide social security system was sufficiently weighty to require that an Amish employer pay unemployment and social security taxes, even though the Court acknowledged that doing so would burden the Amish employer's religious beliefs. 455 U.S. at 258. The Court observed that the social security system "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* The system would not have been viable unless broad participation was required, and the Court held that the governmental interest "in assuring mandatory and continuous participation in and contribution to the social security system" sufficed to justify the acknowledged burden on the employer's religious exercise. *Id.* at 258-59.

So, too, in *Hernandez*, the Court rejected a claim that denial of certain tax deductions violated the plaintiffs' religious exercise because "even a substantial burden [on the exercise of religion] would be justified by the broad public interest in maintaining a sound tax system." 490 U.S. at 699-700 (internal quotation marks omitted). The government concluded that the success of the ACA's effort to expand access to health care,

improve outcomes, and control costs similarly depends on widespread use of preventive care, which the Act encourages by requiring that particular preventive measures be provided free of cost. *See* 78 Fed. Reg. at 39,872.

The Supreme Court's recognition of compelling governmental interests in the physical health and safety of the public, albeit in factually very different contexts, further supports the gravity of the government's interest in the contraceptive coverage requirement. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The Court in *Prince* sustained child labor laws against a free exercise challenge based on the government's paramount interest in protecting the health and welfare of children. 321 U.S. at 165-71. In *Jacobson*, a mandatory, mass vaccination program withstood a constitutional liberty challenge because it served the government's interest in "the public health and the public safety." 197 U.S. at 25-26. Those cases support the strength of health interests behind the contraceptive coverage regulations, which include interests in avoiding health risks to women and children from unplanned pregnancies. Indeed, these very same interests—pediatric care and immunizations—are protected by companion provisions to the Women's Health Amendment in the ACA. *See* 42 U.S.C. § 300gg-13(a)(2), (3). Under Plaintiffs' argument, and contrary to *Prince* and *Jacobson*, those interests could fall to the same type of religious challenge as is leveled here by organizations that sincerely object to the types of care they cover.

The Supreme Court has recognized the interest in eliminating discrimination against women as sufficiently compelling to justify incursions on rights to expressive association. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (recognizing compelling interest in creating "rights of public access" to private goods and services in order to promote women's equal enjoyment of leadership skills, business contacts, and employment promotions). Those cases lend gravitas to the government's interest in the contraceptive coverage requirement as an effort to eradicate lingering effects of sex discrimination. *See generally Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

The Supreme Court majority in *Hobby Lobby* characterized the government's interests in "promoting public health and gender equality" as "broadly framed" and noted that RFRA "contemplates a more focused inquiry." 134 S. Ct. at 2779 (internal quotation marks omitted). The government has pathmarked the more focused inquiry by explaining how those larger interests inform and are specifically implicated in its decision to support women's unhindered access to contraceptive coverage. We do not take the government to suggest that its interests in "public health" and "gender equality" necessarily render compelling every subsidiary governmental action that advances them. Each of those interests, however, specifically undergirds the government's decision here to provide seamless coverage of contraceptive services for women who want them and whose doctors prescribe them.

As we explain below, compelling interests converge to support the government's decision, reflected in the challenged regulations, to provide cost-free contraceptive coverage and to remove administrative and logistical obstacles to accessing contraceptive care. Those compelling governmental interests suffice to support requiring eligible organizations to ask for an accommodation if they want to take advantage of one, so that the government can protect its interests by ensuring that the resulting coverage gaps are filled.

a. Improving Public Health Through Contraceptive Coverage

The ACA is an ambitious effort to reform the health care system in the United States. It is designed to expand access to comprehensive insurance coverage as a means of controlling spiraling health care costs while improving health. *See* Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 1 (2008) ("CBO Report"); *see also* Remarks by the President at the Annual Conference of the American Medical Association (June 15, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-annual-conference-american-medical-association. The United States in recent years spent far more on health care than did many other developed nations. At the same time, the quality of care Americans received was lower and our population was no healthier than people in countries that spent less. CBO Report at 1.

Congress understood that improved health at affordable cost cannot be attained without increased reliance on preventive care. Most people underestimate the importance of prevention and are easily hindered from undertaking preventive steps because the costs

and effort of preventive health care are immediate while benefits typically are uncertain and deferred. Many adverse health conditions and an enormous amount of costly care can be avoided if people better understand risky behavior, plan more carefully, and take measures to reduce their risks, exposures, and errors. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16-17 (2011) ("IOM Report").[23] Providing preventive care—including patient education, screenings, preventive medications and devices, and early treatment—can be less costly than treating advanced diseases and conditions. *See id.*; *Chronic Diseases and Health Promotion*, Centers for Disease Control and Prevention, http://www.cdc.gov/chronicdisease/overview/ (last visited Nov. 5, 2014); *see also* CBO Report at 136-38. Yet, before enactment of the ACA, only a small portion of health care spending went to prevention. *See* Centers for Disease Control and Prevention, *The Power of Prevention* (2009), *available at* http://www.cdc.gov/chronicdisease/pdf/2009-power-of-prevention.pdf.

Congress and the Executive Branch determined that serving the government's compelling public health interests depends on overcoming the human behavioral tendencies of denial and delay documented in the legislative and regulatory record. People tend to eschew preventive care when they have to pay for it, make even minor efforts to learn about and enroll in new programs, keep multiple appointments, or follow new routines. Because "[i]ndividuals are more likely to use

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[23] As noted above, the government directed the HRSA, in consultation with IOM, to develop guidelines for women's preventive care services. This report was part of that effort.

preventive services if they do not have to satisfy cost-sharing requirements," 78 Fed. Reg. at 39,872, the ACA requires group or individual health plans to include coverage for a variety of preventive health services without cost sharing. 42 U.S.C. § 300gg-13(a). "Studies have . shown that even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report at 19.

The government further determined that the imperative of providing broad access to preventive care applies with full force to women's health. Congress was informed during debates on the ACA that "too many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its costs." 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); *see also* 155 Cong. Rec. 28,842-43 (2009) (statement of Sen. Mikulski). In light of this reality, Senator Mikulski proposed the Women's Health Amendment, which expanded the list of preventive health services the ACA required that insurers cover without cost sharing to include preventive health care and screenings for women. 155 Cong. Rec. 28,800-02 (2009) (codified at 42 U.S.C. § 300gg-13(a)(4)). Congress in the ACA directed the HRSA to develop the list of covered preventive services. The HRSA commissioned the IOM to identify preventive health services with strong scientific evidence of health benefits. The IOM's report recommended preventive services it deemed necessary for women's health and well-being. HRSA accepted IOM's findings and recommendations, and the Departments relied on them when crafting both the exemption and the accommodation.

The HRSA and IOM concluded that, given women's reproductive health needs, preventive health services for women should include contraceptive coverage. IOM Report at 109-10; *see also* 77 Fed. Reg. at 8,725. The government recognized that the cost of reproductive health care, including contraceptives, is significant, and it falls disproportionately on women. 78 Fed. Reg. at 39,873, 39,887 The vast majority of women who have sex with men use contraceptives at least some of the time. *See* IOM Report at 103. Most contraceptives used by women, and the forms that are most effective and fully reversible, are available only with a prescription and in some cases must be administered by a medical professional. *See id.* at 105; Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982-2010*, 62 Nat'l Health Stat. Rep. 1 (2013), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf (hereinafter "Daniels"). Those forms—including birth control pills, injectable methods, contraceptive patches, and intrauterine devices ("IUD")—have been used at one time or another by 88 percent of women who have had sexual intercourse. Daniels at 1.

The Institute of Medicine observed that high costs regularly cause women to forego contraception completely or to choose less effective methods: "Even small increments in cost sharing have been shown to reduce the use of preventive services . . . The elimination of cost sharing for contraception therefore could greatly increase its use, including the use of the more effective and longer-acting methods, especially among poor and low-income women most at risk for unintended pregnancy." IOM Report at 109; *see also* 78 Fed. Reg. at 39,873. Prescription methods of

contraception have lower failure rates than non-prescription methods such as condoms, IOM Report at 105, but can be quite expensive. The cost of an IUD, one of the most convenient and effective forms of reversible contraception, is nearly a month's full-time pay for workers earning the minimum wage, and its cost makes it less likely that women will use it. *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).

Thus the government decided to require contraceptive coverage without cost sharing because appropriate and consistent use of contraceptives furthers women and children's health in a variety of ways. Enabling couples to control the timing and spacing of pregnancies improves women's health outcomes. Short intervals between pregnancies increase maternal mortality and pregnancy-related complications. IOM Report at 103-04. Even a normal and healthy pregnancy is a demanding physical process for a woman. Pregnancy increases risks of health complications, such as anemia, gestational diabetes, hypertension, hyperemesis gravidarum, and even death. *See generally* 78 Fed. Reg. at 39,872, 39,887 (stressing the importance of covering preventive care to respond to women's unique health needs); *Pregnancy Complications*, Centers for Disease Control and Prevention, http://www.cdc.gov/reproductivehealth/maternalinfanthealth/ pregcomplications.htm (last visited Nov. 5, 2014); *Pregnancy Related Deaths*, Centers for Disease Control and Prevention, http://www.cdc.gov/reproductivehealth/MaternalInfantHealth/Pregnancy-relatedMortality.htm (last visited Nov. 5, 2014).

A core reason the government sought under the ACA to expand access to contraception is that use of contraceptives reduces unintended pregnancies. According to the Institute of Medicine, in 2001, "49 percent of all pregnancies in the United States were unintended." IOM Report at 102. There is "an 85 percent chance of an unintended pregnancy within 12 months among couples using no method of contraception." *Id.* at 105. Unintended pregnancies elevate health risks for women and children and impose other costs on society. Women whose pregnancies are unintended are more likely to experience depression, anxiety, or domestic violence during those pregnancies. IOM Report at 103; *see also Korte v. Sebelius*, 735 F.3d 654, 725 (7th Cir. 2013) (Rovner, J., dissenting). "In 2001, 42 percent of U.S. unintended pregnancies ended in abortion." IOM Report at 102. Reducing the frequency of unintended pregnancies would reduce the frequency of abortions. 78 Fed. Reg. at 39,872; *see also* IOM Report at 105. Supporting access to contraception empowers women to avoid the physical burdens and risks of pregnancy unless and until they decide to undertake them.

The government further relied on the ways that contraceptive use can promote and improve women's health apart from their procreative health needs. Women contraindicated for pregnancy, such as those with certain heart conditions, hypertension, diabetes, Marfan Syndrome, or lupus, face health hazards from pregnancy that can be life threatening. *See* 78 Fed. Reg. at 39,872; IOM Report at 103-04; *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring), *id.* at 2799 (Ginsburg, J., dissenting). Women with those conditions have especially critical needs to time their

pregnancies appropriately, such as by waiting until their conditions are under control. Doctors also recommend that women taking certain medications that pose risk to maternal and fetal health avoid getting pregnant. Hormones manufactured and sold as contraception are also used to treat, manage, or prevent other diseases, such as "certain cancers, menstrual disorders, and pelvic pain." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); *see also* 78 Fed. Reg. 39,872; IOM Report at 107.

The Institute of Medicine reported that, for similar reasons, contraceptive use also promotes the health of infants and children. Children who are born as the result of unintended pregnancy suffer increased health risks on average, including preterm birth and low birth weight and associated complications. IOM Report at 103. Women who do not immediately know they are pregnant, or are ambivalent about bearing children, are more likely to delay prenatal care or engage in behaviors that pose pregnancy related risks. 78 Fed. Reg. at 39,872; IOM Report at 103. Short intervals between pregnancies also can have serious health consequences for infants, such as low birth weight, prematurity, and small-for-gestational age. 78 Fed. Reg. at 38,872; IOM Report at 103. Women in hazardous jobs or precarious or dangerous living situations may need to delay pregnancy in order to reduce the health risks for a child. Permitting women to control the timing and spacing of their pregnancies improves the health and welfare of women, children, and infants.

b. Assuring Women Equal Benefit of Preventive Care By Requiring Coverage of Their Distinctive Health Needs

The government also relied on evidence that advancing women's well being by meeting their health needs as fully as those of men was a compelling reason for a contraceptive coverage requirement. In enacting and implementing the ACA, the government sought to provide coverage that offers equal benefit for men and women. 78 Fed. Reg. at 39,887. Before the ACA, insurance coverage for a female employee was "significantly more costly than for a male employee." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Women paid more for the same health insurance coverage available to men and "in general women of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); *see* 78 Fed. Reg. at 39,887

The government recognized that women pay more for the same health benefits in part because services more important or specific to women have not been adequately covered by health insurance. *See* 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand). Contraception is a key element of preventive care for many women, yet the methods that are most reliable and are under a woman's control require prescriptions and are disproportionately more expensive than non-prescription forms of contraception. *See* IOM Report at 105, 108. Condoms, which are inexpensive and widely available over the counter, require men's cooperation and are substantially less effective in pregnancy prevention than prescription methods. *See*

id. at 105. When Congress added the Women's Health Amendment to the ACA, which requires group health plans to include preventive health care services for women without cost sharing, it did so precisely to end "the punitive practices of the private insurance companies in their gender discrimination." 155 Cong. Rec. 28,842 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski). The government concluded that a preventive care package that failed to cover contraception would not give women access, equal to that enjoyed by men, to the full range of health care services recommended for their specific needs. *See* 78 Fed. Reg. at 39,887.

For most women, whether and under what circumstances to bear a child is the most important economic decision of their lives. An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands on any family, and those demands fall disproportionately on women. As the Supreme Court has recognized "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 856 (1992); 78 Fed. Reg. at 39,873 ("[A]ccess to contraception improves the social and economic status of women."). Congress noted when enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e *et seq.*), and Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 *et seq.*), a woman's

ability to get pregnant has led to pervasive discrimination in the workplace.[24]

The government has amply substantiated its compelling interests in the accommodation. The government has overlapping and mutually reinforcing compelling interests in promoting public health and gender equality. The contraceptive coverage requirement specifically advances those interests. It was adopted to promote women's equal access to health care appropriate to their needs, which in turn serves women's health, the health of children, and women's equal enjoyment of their right to personal autonomy without unwanted pregnancy. We hold that the accommodation is supported by the government's compelling interest in providing women full and equal benefits of preventive health coverage, including contraception and other health services of particular relevance to women.

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[24] *See Hibbs*, 538 U.S. at 736 ("'Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'" (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 2d Sess., 100 (1986)); *see also* S. Rep. No. 95-331, at 3 (1977) ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.").

2. The Regulations Use the Least Restrictive Means to Ensure Contraceptive Coverage While Accommodating Religious Exercise

In addition to calling on us to inquire whether the challenged contraceptive coverage requirement serves a compelling interest, RFRA demands that we guard against unnecessary impositions on religious exercise by carefully examining the particular way the government has gone about serving that interest. The Departments designed the challenged accommodation for eligible organizations fully cognizant of RFRA's mandate. *See* 78 Fed. Reg. at 39,886-88. As already described, the accommodation excuses eligible organizations from the contraceptive coverage requirement, severs them from any involvement in the separate contraceptive coverage to which the employees are entitled, and specifies that employees must be notified that the objecting organizations have no involvement in providing their contraceptive coverage.

Adverting to this accommodation in *Hobby Lobby*, the Supreme Court stressed that it alleviates the burden on the plaintiffs of having to provide contraceptive coverage and "serves HHS's stated interests equally well." *Hobby Lobby*, 134 S. Ct. at 2782. The Court described the accommodation as "an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* at 2759; *see id.* at 2786 (Kennedy, J., concurring) (the "accommodation equally furthers the Government's interest but does not impinge on the plaintiff's religious beliefs"). In fact, the Court

explained that the effect of the accommodation on women "would be precisely zero." *Id.* at 2760.

In determining whether the government has used the least restrictive means, the Supreme Court has instructed that we focus on the context of the religious objectors, and consider whether and how the government's compelling interest is harmed by "'granting specific exemptions to particular religious claimants.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Gonzales v. O Centro Espírita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006)). We must "look to the marginal interest in enforcing" the regulation to which the plaintiffs object. *Id.* (citing *O Centro*, 546 U.S. at 431).

The government's compelling interests in the contraceptive coverage requirement are met with the least imposition on religious exercise by allowing eligible organizations to opt out, but requiring them to identify themselves when they do. Only if the eligible organizations communicate that they are dropping contraceptive coverage from the health insurance they have arranged for their employees will the government be able to ensure that the resultant gaps in employees' coverage are otherwise filled. The government contends that its interests would be impaired if eligible organizations were entitled to exempt themselves from the contraceptive coverage requirement without notifying either HHS, or their insurers or TPAs.

The government has an interest in the uniformity of the health care system the ACA put in place, under which all eligible citizens receive the same minimum level of coverage. Like the Social Security system at issue in *Lee*, the ACA "serves the public interest by

providing a comprehensive insurance system with a variety of benefits available to all participants." 455 U.S. at 258. Contraceptive coverage must be effective if it is to serve the government's compelling interests, and the Departments were justified in concluding that, to be effective, the coverage must be provided to all women who want it, on the same terms as other preventive care. Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest in effective access. Imposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage. *See* 78 Fed. Reg. at 39,888.

The evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles. Plaintiffs suggest that the government could offer tax deductions or credits for the purchase of contraceptive services, expand eligibility for existing federal programs that provide free contraception, allow women to submit receipts to the federal government for reimbursement, or provide incentives for pharmaceutical companies to provide contraceptives free of charge to women. Pls.' R. Br. 22. Those alternatives would substantially impair the government's interest. Plaintiffs' proposed alternatives each would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical, informational, and

administrative burdens. *See* 78 Fed. Reg. at 39,888. Even assuming that any alternative program had or would develop the capacity to deal with an enormous additional constituency, it would not serve the government's compelling interest with anywhere near the efficacy of the challenged accommodation and would instead deter women from accessing contraception. *See id.*

Plaintiffs also dispute the government's compelling interest in applying the contraceptive coverage requirement to them on the ground that there is "no evidence" showing that Plaintiffs' employees lack access to or want contraception. Pls.' Supp'l Br. 16-17 The data upon which the government relies support its conclusion that women generally benefit from access to contraceptive coverage, and are unlikely to use such coverage when it is costly or complicated to obtain. *See* 78 Fed. Reg. at 39,887-88. There is no reason to believe that the health needs of Plaintiffs' employees or spouses and other covered beneficiaries in their families are materially different from those of other women. Religious nonprofits like the Plaintiff organizations employ millions of Americans—including individuals who do not share their beliefs. As the government recognized, "[e]mployers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." 77 Fed. Reg. at 8,728. The evidence justifying the contraceptive coverage requirement equally supports its application to Plaintiffs.

Accommodating religious entities need not come at the cost of the compelling interests the government program serves. When the interests of religious adherents collide with an individual's access to a government program supported by a compelling interest, RFRA calls on the government to reconcile the competing interests. In so doing, however, RFRA does not permit religious exercise to "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring); *see also id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"). The opt out offered to religious adherents allows the government to further its compelling interests with the least restriction on religious exercise. Under the accommodation, eligible organizations are relieved of the obligation to include contraceptive coverage in their health care plans, but "women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760. Allowing eligible organizations to exempt themselves completely from the contraceptive coverage requirement, without so much as notifying their plan or HHS that they have done so, would undermine the government's interest in the breadth of the scheme established in the ACA.

The government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans. The government can have an interest in the uniform application of a law, even if that

law allows some exceptions. *See, e.g.*, *Lee*, 455 U.S. at 261. In any event, the exemptions to the ACA are limited and the rationales that support them do not extend to exempting Plaintiffs. Currently, only religious employers' plans and grandfathered health plans (employer health plans that existed prior to March 23, 2010, and that have not made particular changes after that date) are not required to include coverage for preventive services. 42 U.S.C. § 18011(a), (e). Religious employers are exempt from the contraceptive coverage provision because the government reasonably assumed that if the church opposed contraception, the church's employees would, too. *See* 77 Fed. Reg. at 8,728. The exception for grandfathered plans sought to limit disruption by enabling individuals temporarily to maintain their health care coverage as it existed prior to enactment of the ACA. That exception is a transitional measure and will be eliminated as employers make changes to their health care plans. *See* 45 C.F.R. § 147.140(g) (a health plan ceases to be a grandfathered plan when it eliminates benefits, increases cost-sharing requirements, or changes its employer-contribution terms). According to HHS estimates, 66 percent of small-employer plans and 45 percent of large-employer plans were expected to lose their grandfathered status by the end of 2013.[25] 75 Fed. Reg. 34,538, 34,552 (June

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[25] According to a 2013 study conducted by Kaiser Health News, the grandfathering is already quickly phasing down. Thirty-six percent of individuals who receive health care coverage through their employer in 2013 were enrolled in a grandfathered health plan, as compared to 48 percent in 2012 and 56 percent in 2011. *Employer Health Benefits: 2013 Annual Survey*, Kaiser Family Foundation and Health Research & Educational Trust, at 221, *available at*

17, 2010). The exemption for small employers (those with fewer than 50 employees) is not an exemption from the contraceptive coverage requirement, but from the requirement to provide any health insurance to their employees. 26 U.S.C. § 4980H(c)(2). Employees who do not get insurance through their jobs because they work for exempt small employers are eligible to purchase it through the exchanges, where all listed plans are required to cover contraceptive services without cost sharing. None of the three exemptions is analogous to what the Plaintiffs here seek.

* * *

The accommodation is the least restrictive method of ensuring that women continue to receive contraceptive coverage in a seamless manner while simultaneously relieving the eligible organizations of any obligation to provide such coverage. Because the government has used the least restrictive means possible to further its compelling interest, RFRA does not excuse Plaintiffs from their duty under the ACA either to provide the required contraceptive coverage or avail themselves of the offered accommodation to opt out of that requirement. The accommodation meets the twin aims of respecting religious freedom and ensuring that women continue to receive contraceptive coverage without administrative, financial, or logistical burdens. The regulations thus respond appropriately to RFRA's explicit demand for "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

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http://kaiserhealthnews.files.wordpress.com/2013/11/8465-employer-health-benefits-20131.pdf.

V. Constitutional Claims

Plaintiffs raise several constitutional challenges to the regulations. We address each in turn, concluding that the regulations do not violate any of the constitutional provisions identified by Plaintiffs.

A. Free Exercise of Religion

Plaintiffs claim that the contraceptive coverage requirement violates the Free Exercise Clause of the First Amendment because it categorically exempts houses of worship from the contraceptive coverage requirement and temporarily relieves grandfathered plans from the requirement to cover any preventive services without cost sharing, while not similarly exempting Plaintiffs. The Free Exercise Clause embodies a "fundamental nonpersecution principle." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). But it "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). A Free Exercise Clause challenge, in contrast to a claim under RFRA, receives strict scrutiny only if the challenged law is either not neutral or not generally applicable. *See Lukumi Babalu*, 508 U.S. at 531. We have held that the regulations comply with RFRA; they readily satisfy the less stringent free exercise standard.

"Neutrality and general applicability are interrelated," but distinct. *Id.* A law is not neutral if it facially "refers to a religious practice without a secular meaning discernable from the language or context," or

if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if, "in a selective manner," it "impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543.

Plaintiffs do not contend that the challenged contraceptive coverage requirement is religiously non-neutral on its face, nor that it was enacted for an anti-religious purpose, but that the exemptions provided to houses of worship and grandfathered plans render the contraceptive coverage requirement non-neutral and not generally applicable. Those exemptions, however, do not impugn the contraceptive coverage requirement's neutrality and generality: it is both, in the relevant sense of not selectively targeting religious conduct, whether facially or intentionally, and broadly applying across religious and nonreligious groups alike. *See Mich. Catholic Conf.*, 755 F.3d at 394; *RCAW*, 2013 WL 6729515, at *27-31; *Priests for Life*, 7 F Supp. 3d at 105-07

The contraceptive coverage requirement is a religiously neutral part of a national effort to expand health coverage and make it more efficient and effective. The ACA's limited or temporary exemptions do not amount to the kind of pattern of exemptions from a facially neutral law that demonstrate that the law was motivated by a discriminatory purpose. *See supra* Section IV.B.2. The Florida prohibition on animal killing invalidated in *Lukumi Babalu*, by contrast, responded to the opening of a Santeria church, which practiced religious animal-sacrifice rituals. 508 U.S. at 524. The ordinance elaborated a putatively general prohibition on animal killings with

specific disapproval of killing for "sacrifice" as part of "any type of ritual," while exempting as "necessary" killings for sport hunting, slaughtering animals to eat them, eradication of pests, and euthanasia—killings that were "no more necessary or humane" than the forbidden Santeria sacrifices. *Id.* at 536-37. That exemption for so many non-religious types of animal killing helped to make clear that "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 534. The exemptions in the ACA do not single out any religion and are wholly consistent with the law's neutral purpose. Indeed, the existence of an exemption for religious employers substantially undermines contentions that government is hostile toward such employers' religion.[26]

The contraceptive coverage requirement also does not target religious organizations, but applies across the board. The exemptions do not render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective. *See RCAW*, 2013 WL 6729515, at *30. For example, the Supreme Court has held that, despite statutory exemptions for self-employed Amish employers, the social security

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[26] *See, e.g.*, *RCAW*, 2013 WL 6729515, at *28 (availability of the religious employer exemption "cuts against the conclusion that the contraceptive mandate was specifically designed to oppress those of the Catholic faith as plaintiffs suggest"); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *6 (M.D. Tenn. Dec. 26, 2013) (noting that exemption for religious employers and accommodation for eligible organizations "evidences an intent, not to burden Plaintiffs' religious beliefs, but to recognize and respect them").

system was "uniformly applicable to all." *United States v. Lee*, 455 U.S. 252, 260-61 (1982); *see also id.* at 262 (Stevens, J., concurring in the judgment) (describing the challenged law as "a valid tax law that is entirely neutral in its general application"). As the Sixth Circuit recently explained: "General applicability does not mean absolute universality." *Mich. Catholic Conf.*, 755 F.3d at 394 (internal quotation marks omitted).

Plaintiffs contend that the ACA's exemptions make it under-inclusive in a way that suggests that the government believes that "secular motivations [for providing an exemption] are more important than religious motivations," Pls.' Br. 50 (internal quotation marks omitted), evidencing that the government "devalues religious reasons," Pls.' R. Br. 25 (internal quotation marks omitted). But, for the same reasons the exemptions do not undermine the government's interest in a uniform system, *see supra* Section IV.B.2, the exemptions do not demonstrate the government's hostility toward religious concerns.

Because the contraceptive coverage requirement is a neutral law of general applicability, Plaintiffs' free exercise claim fails.

B. Expressive Association

The *Priests for Life* Plaintiffs argue that the contraceptive coverage requirement violates their First Amendment rights to expressive association, which protects the "right to associate for the purpose of speaking." *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 68 (2006). The regulations infringe that right, the *Priests for Life* Plaintiffs contend, by requiring them to

promote the government's immoral objective of expanding access to contraceptives, which undermines the organization's "very reason for its existence." Pls.' Br. 51. The *Priests for Life* Plaintiffs base their expressive association claim, like their RFRA claim, on a misreading of what the regulations require of them, suggesting that the regulations require them to disclose the identities of their employees and plan beneficiaries. *See, e.g.*, Pls.' Br. 52-53. They do not.

A law may violate the First Amendment right to expressive association where it directly interferes with an expressive association's membership decisions or where it indirectly affects the group's composition by making membership less attractive. *FAIR*, 547 U.S. at 69. In *FAIR*, the Supreme Court held that a law requiring law schools receiving federal funds to give military recruiters access to the schools' facilities equal to the access it afforded other recruiting employers did not violate the objecting schools' rights to associate. *Id.* at 69-70. The law schools' non-discrimination policies prohibited discrimination based on sexual orientation, and, because the United States Military refused at that time to hire any openly gay or lesbian applicants, the law schools were strongly opposed to hosting military recruiters and actively facilitating their access to the schools' students. The Court rejected that claim, holding that the military recruiters' presence on campus "does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." *Id.* at 70. The Court acknowledged that the plaintiffs there had to "'associate' with military recruiters in the sense that they interact with them," but held that, because the recruiters were as an institutional matter outsiders

who would "come onto campus for the limited purpose of trying to hire students," they did not impinge on the schools' expressive association. *Id.* at 69.

The same is true here: the *Priests for Life* Plaintiffs object to interacting with coverage providers that must make contraceptive coverage available, but such interaction does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message. Just as the students and faculty in *FAIR* remained "free to associate to voice their disapproval of" the military's policy against gays or lesbians serving openly in the military, *id.* at 69-70, Priests for Life's members and employees remain free to associate with each other to promote their religious views on contraception and other matters, and to voice their disapproval of health-care products and services that they believe to be immoral. "Nothing in the[] final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. Accordingly, the *Priests for Life* Plaintiffs' expressive association claim fails.

C. Compelled Speech

It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted); *see Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2282 (2012) ("The government may not . . compel the endorsement of ideas that it approves."). Plaintiffs contend that the regulations impermissibly compel their speech in three ways.

First, Plaintiffs claim that the regulations require them to authorize and facilitate health care coverage for counseling that encourages and promotes contraception, in violation of their right against compelled speech. Plaintiffs appear to contend that the regulations commandeer them to echo or facilitate the words of medical professionals who might communicate to insured women the availability and potential appropriateness of various contraceptive methods. But the regulations do not require Plaintiffs to communicate any pro-contraceptive-coverage message, nor to authorize or facilitate counseling in favor of contraception. *See supra* Section IV.A.2; *Mich. Catholic Conf.*, 755 F.3d at 391. They leave Plaintiffs free to voice their opposition to contraception.

Plaintiffs' reliance on *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), is misplaced. *Arizona Free Enterprise Club* concerned a state campaign finance law under which candidates for state office who accepted public funding could receive additional state funds in the event that privately financed candidates and independent expenditure groups exceeded spending limits. *See id.* at 2813. Under Arizona's law, the volume of political expenditures by or in support of a privately financed candidate triggered funding to his or her opponent. *See id.* at 2818-19. Plaintiffs' completion of the self-certification form has no similar triggering role, and there is no interest or effect here to level competing voices, which was a significant aspect of the constitutional infirmity of Arizona's campaign finance law. *See id.* at 2825. Furthermore, contrary to Plaintiffs' argument, nothing in *Arizona Free Enterprise Club* suggests that the prohibition on

compelling a party to "help disseminate hostile views" the party opposes, *id.* at 2821 n.8 (internal quotation marks omitted), applies to laws that require a party to engage in non-expressive behavior, such as the provision of health insurance.

Second, Plaintiffs argue that completing the self-certification form requires them to express a particular view, namely, that they oppose providing their plan participants with coverage for contraceptive services, and that it deprives them of the freedom to speak on this issue on their own terms.[27] The self-certification form and alternative notice are the methods through which Plaintiffs can opt out of the requirement to provide their employees with health insurance coverage for contraceptive services. The filing of the form, though it may include "elements of speech," is "a far cry from the compelled speech" that the Supreme Court previously has found to be unconstitutional. *FAIR*, 547 U.S. at 61-62 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). Just as the compelled speech that the law schools identified in *FAIR* was "plainly incidental to the Solomon Amendment's regulation of conduct," *id.* at 62, any speech required by the self-certification or alternative notice is similarly incidental to the accommodation's regulation of conduct. Compelling an organization to send a form to a third party to claim eligibility for an exemption "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or

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[27] Plaintiffs' briefing contends only that their speech is impermissibly compelled by the self-certification form, and does not address their compelled speech claim to the alternative notice.

Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.* Requiring Plaintiffs to give notice that they wish to opt out of the contraceptive coverage requirement no more compels their speech in violation of the First Amendment than does demanding that a conscientious objector self-identify as such.

The regulations do nothing to deprive Plaintiffs of "the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own choosing." Pls.' Br. at 55. Completing the self-certification form does not limit what Plaintiffs may say about contraception—or any other topic—nor does it limit where, when, or how they may say it. *See Mich. Catholic Conf.*, 755 F.3d at 392. Indeed, unlike the law schools in *FAIR* that had to host military recruiters and thus might have mistakenly been viewed as endorsing the military's discriminatory recruitment approach, the opt out here is designed to ensure that Plaintiffs do not have to express, in words or symbolic backing, any support for contraception. *Cf. FAIR*, 547 U.S. at 64-65 (government is limited in its "ability to force one speaker to host or accommodate another speaker's message" where accommodating that message interferes with the plaintiff's desired message).

Finally, Plaintiffs object to the regulations because they require that Plaintiffs' plan participants receive notice of the availability of payments for contraceptive services. Thus, according to Plaintiffs, the regulations coerce them to provide access to their plan participants and either create the appearance that Plaintiffs agree with the notification or call on them to respond to the

notice to inform participants of Plaintiffs' objections to contraception.

But the regulations actually require quite the contrary: the plan issuer or TPA must send a message explicitly distancing the employer from the offered contraceptive coverage, and do so in a completely separate mailing from any communication regarding the employer-sponsored plan. 45 C.F.R. § 147.131(d) (insured group health plans); 29 C.F.R. § 2590.715-2713A(d) (self-insured plans). The regulations, therefore, take care to inform plan participants that the coverage for contraceptives is not paid for, administered by, or connected to Plaintiffs. That is a long way from unconstitutionally compelling Plaintiffs to speak.[28]

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[28] The *RCAW* Plaintiffs challenged the regulations' "non-interference" provision as an unconstitutional speech restriction, but as that provision has been rescinded, their challenge is moot. The provision originally barred self-insured employers from "directly or indirectly, seek[ing] to influence the [TPA's] decision" to provide or arrange separate payments for contraceptive services. 79 Fed. Reg. at 51,095. The government interpreted that bar as applicable only to the use of bribery, threats, or coercion to dissuade or hinder a TPA from fulfilling its legal obligation to provide contraceptive coverage. *Id.* The government has now rescinded the non-interference provision in its entirety. *Id.* Plaintiffs maintain that they still challenge the non-interference provision "to the extent the Government contends it continues to be unlawful to 'say to the[ir] TPA, if you don't stop making the payments for contraceptives, we're going to fire you.'" Pls.' Supp'l Br. 27 n.12 (internal brackets omitted). As the government asserted at oral argument, however, even when the non-interference provision was in effect, Plaintiffs were free to fire their insurers or TPAs as they wished. Oral. Arg. Tr. at 46:15-48:1.

D. Establishment of Religion

Plaintiffs advance two Establishment Clause claims. They first contend that the regulations impermissibly discriminate between types of religious institutions by making a general distinction, familiar in tax law, between churches and other houses of worship (which are automatically exempt), and nonprofit organizations that may have a religious character or affiliation, such as universities and hospitals (which may use the accommodation to opt out). 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order" from an annual return filing requirement). Second, they contend that the regulations entail excessive entanglement between the government and religious institutions. Specifically, to the extent that the regulations seek to be more nuanced and context specific, looking at specific attributes of each organization in an effort accurately to distinguish among them, Plaintiffs contend the government impermissibly interferes with internal church governance.

The regulations draw a long-recognized and permissible distinction between houses of worship and religious nonprofits. The Seventh Circuit, in rejecting a similar challenge to the contraceptive coverage regulations, noted that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560

(internal citation omitted). The churches gained the categorical exemption on the assumption that the relatively small numbers of employees who are employed by a church will, if their church's mission opposes contraception, be ministers or clerics likely to share that view, or at least have knowingly joined a pervasively sectarian institution that expects them to. 77 Fed. Reg. at 8,728. The categorical exemption was not extended to the broader group of religious nonprofits, however, because religiously affiliated hospitals, universities and social service agencies employ a wide range of people of diverse faiths and are thus "more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." *Id.* Limiting the exemption, but making the opt out available, limits the burdens that flow from organizations "subject[ing] their employees to the religious views of the employer." *Id.*

Plaintiffs equate the familiar regulatory distinction between houses of worship and religiously affiliated organizations, based on organizational form and purpose, with constitutionally impermissible distinctions based on denomination. They quote *Larson v. Valente*, 456 U.S. 228, 231-32, 246 n.23 (1982) and *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008), for the notion that the Establishment Clause forbids distinguishing between "types of institutions" as surely as between "sects or denominations." Pls.' Br. 57-58 (internal quotation marks omitted). Both of the cases Plaintiffs rely on, however, were concerned with lines drawn based on denomination, rather than organizational form or

purpose.[29] In *Larson*, the Supreme Court invalidated a state law that imposed special registration requirements on churches that received a majority of their donations from non-members because it facially discriminated against religious denominations that were newer or chose to rely on public solicitation rather than financial support from members. 456 U.S. at 246-48. The distinction invalidated in *Colorado Christian* authorized public scholarships for students at Methodist and Roman Catholic universities while refusing them to students attending non-denominational evangelical Protestant or Buddhist universities. *See* 534 F.3d at 1258. The *Colorado Christian* court contrasted that denominational discrimination with the permissible exclusion "of all devotional theology majors equally." *Id.* at 1256 (citing *Locke v. Davey*, 540 U.S. 712, 715-16 (2004)). This Court in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002), similarly invalidated a regulatory line that effectively asked whether certain schools were "*sufficiently* religious" to be exempt from NLRB jurisdiction, administration of which line had drawn the government into questioning whether the university "was legitimately 'Catholic.'" *Id.* *University of Great Falls* favors a test relying on more objective factors about the institution's structure and activities. *Id.* The regulations at issue here draw distinctions based on organizational form and purpose, and not religious belief or denomination, in keeping with

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[29] Indeed, the Plaintiffs' argument would call into question the tax advantages that have long been available to houses of worship, but not other types of religious organizations. Those tax advantages have not been thought to violate the Establishment Clause. *See Notre Dame*, 743 F.3d at 560.

Larson, *Colorado Christian*, and *University of Great Falls*. *See also Mich. Catholic Conf.*, 755 F.3d at 395; *Notre Dame*, 743 F.3d at 560.

Additionally, Plaintiffs assert that the regulations violate the Establishment Clause because they believe they call on the government impermissibly to "'troll[] through a person's or institution's religious beliefs.'" Pls.' Br. 60 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). The regulations define a "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a); *see also* 78 Fed. Reg. at 8,461 (stating that the exemption is restricted primarily to "churches, synagogues, mosques, and other houses of worship, and religious orders"). The IRS has developed a non-exhaustive, non-binding list of fourteen factors to consider when determining whether an entity is in fact a religious employer. *See Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980); *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009).

Plaintiffs contend that, in order to determine whether an entity is in fact a religious employer, the government asks intrusive questions about its religious beliefs in violation of the Establishment Clause. They complain that the IRS factors "favor some types of religious groups over others" and that "they do so on the basis of intrusive judgments regarding beliefs, practices, and organizational structures." Pls.' Br. at 61. It is undisputed in this case that the Archdiocese is a religious employer, and no other Plaintiff contends

that it was improperly denied religious-employer treatment. As a result, Plaintiffs do not challenge a determination that has been made using those factors, nor can they argue that the factors were impermissibly applied to them. Therefore, we agree with the district court that this challenge is not ripe for review. *RCAW*, 2013 WL 6729515 at *43-44.

E. Internal Church Governance

Relying on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the *RCAW* Plaintiffs allege that the regulations violate the Religion Clauses of the First Amendment by impermissibly interfering with matters of internal church governance. They claim that the regulations "artificially split[]" the Catholic Church in two—into the Archdiocese (an exempt religious employer) and its related nonprofit organizations—and prevent the Archdiocese from "ensur[ing] that these organizations offer health plans consistent with Catholic beliefs." Pls.' Br. at 63-64. Neither *Hosanna-Tabor*, nor any other precedent interpreting either of the Constitution's Religion Clauses, supports this novel claim.

The ACA's regulations do not address religious governance at all. The regulations' separate treatment of functions that Plaintiffs might prefer to group together does not interfere with how the Plaintiffs govern themselves internally. Plaintiffs invoke *Hosanna-Tabor*, but that case does not stand for Plaintiffs' proposition that the First Amendment precludes application of a law simply because it may affect different types of religious institution differently.

In *Hosanna-Tabor*, the Supreme Court recognized a "ministerial exception, grounded in the First Amendment, that precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 132 S. Ct. at 705 (internal quotation marks omitted); *see id.* at 710. The Court expressly limited its holding to "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her." *Id.* The language from *Hosanna-Tabor* that plaintiffs invoke, used there in the context of disapproving judicial review of ministers' discrimination claims because it would interfere "with an internal church decision that affects the faith and mission of the church itself," *id.* at 707, does not apply here. Unlike in that case, nothing about the regulation challenged here would "depriv[e] the church of control over the selection of those who [would] personify its beliefs"—the Church's own ministers. *Id.* at 706. The Court's reasoning in *Hosanna-Tabor* does not extend beyond ecclesiastical employment matters to regulations that may affect a church's decision about its health care plan. Accordingly, the church-governance claim must fail.

F. Equal Protection

The *Priests for Life* Plaintiffs argue that the regulations violate equal protection as guaranteed by the Fifth Amendment, by discriminating on the basis of religion and impinging on their fundamental rights. This claim is largely duplicative of Plaintiffs' Establishment Clause challenge and fails for similar reasons. The *Priests for Life* Plaintiffs cite no case in

support of their contention that alleged discrimination between types of religious organizations within a denomination gives rise to an equal protection claim. Additionally, as the district court observed, the *Priests for Life* Plaintiffs' fundamental rights claim is identical to their other First Amendment claims. *Priests for Life*, 7 F Supp. 3d at 110. Because we have rejected those claims, we apply rational basis scrutiny to the regulations. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (applying rational-basis scrutiny to an Equal Protection Clause claim alleging discrimination based on religion where the plaintiffs' Free Exercise Clause challenge failed). Because, as discussed *supra* Section IV.B, the regulations survive strict scrutiny, they necessarily survive this more limited form of review.

VI. Administrative Procedure Act

The *RCAW* Plaintiffs contend that the government violated the Administrative Procedure Act by erroneously interpreting the exemption to apply on an employer-by-employer basis, rather than a plan-by-plan basis. The regulations state that the HRSA "may establish an exemption from [the regulations] with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines." 45 C.F.R. § 147.131(a). With respect to "multiple employer plans"—plans established or maintained by an exempt religious employer as well as non-exempt organizations—the Departments concluded that "the availability of the exemption or an accommodation

[will] be determined on an employer-by-employer basis." 78 Fed. Reg. at 39,886. This means that "each employer [is] required to independently meet the definition of religious employer or eligible organization in order to avail itself of the exemption or an accommodation." *Id.*

An agency's interpretation of its own regulation is entitled to substantial deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The *RCAW* Plaintiffs contend that such deference is not appropriate here, however, for two reasons. First, they argue that, contrary to the government's contention, the regulation unambiguously states that the exemption applies on a plan-by-plan basis. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). The regulation, however, is silent as to whether the exemption will apply on an employer-by-employer basis or a plan-by-plan basis. It uses the phrase "group health plan," because the contraceptive-coverage requirement applies to group health plans (as opposed to employers), not because the regulatory unit for purposes of the exemption is the plan rather than the employer. Because the regulation does not speak to that issue, we reject the *RCAW* Plaintiffs' claim that the Departments' interpretation is not entitled to deference.

Second, the *RCAW* Plaintiffs assert that deference to the Departments' interpretation is not warranted because it conflicts with a prior interpretation put forth by the government. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) ("[D]eference is likewise unwarranted when there is

reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' This might occur when the agency's interpretation conflicts with a prior interpretation . " (internal citations omitted)). But the Departments have not changed their position. When they issued the Notice of Proposed Rulemaking regarding "Coverage of Certain Preventive Services Under the Affordable Care Act," the Departments made clear that they intended the exemption to apply on an employer-by-employer basis. *See* 78 Fed. Reg. at 8,467 ("The Departments propose to make the accommodation or the religious employer exemption available on an employer-by-employer basis. That is, each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents."). The language on which the *RCAW* Plaintiffs rely to demonstrate that the Departments have changed their position does not support their argument. *See* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). All they point to is a hypothetical that specifies that an exempt religious school is categorically exempt from the contraceptive coverage requirement, whether it establishes and maintains its own plan or offers its employees coverage through a plan established by the exempt religious diocese with which it is affiliated. *See id.* Thus, contrary to the *RCAW* Plaintiffs' contention, the Departments' interpretation that the exemption applies on an employer-by-employer basis does not conflict with its earlier interpretation of the regulation, and is entitled to *Auer* deference.

Finally, in their supplemental brief, Plaintiffs contend that the government lacked the "good cause" required to promulgate the interim final rule without notice and comment. *See* 5 U.S.C. § 553(b)(3)(B) (authorizing promulgation of interim final rules without notice and comment when the agency finds on the record "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). Several reasons support HHS's decision not to engage in notice and comment here. First, the agency made a good cause finding in the rule it issued. *See* 79 Fed. Reg. at 51,095-96. Second, the regulations the interim final rule modifies were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues; moreover, HHS will expose its interim rule to notice and comment before its permanent implementation. *See* 5 U.S.C. § 553(b)(3)(B) (good cause exists when "notice and public procedure are . . . unnecessary"). Third, the modifications made in the interim final regulations are minor, meant only to "augment current regulations in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College*." 79 Fed. Reg. at 51,092; *see also Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) ("We have . . indicated that the less expansive the interim rule, the less the need for public comment."). The government reasonably interpreted the Supreme Court's order in *Wheaton College* as obligating it to take action to further alleviate any burden on the religious liberty of objecting religious organizations. *See* 79 Fed. Reg. at 51,095-96; *see also Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1155-57 (D.C. Cir. 1981) (validating promulgation of interim rule without notice

and comment because, *inter alia*, it would comply with a court order). As the agency explained, delay in implementation of the rule would interfere with the prompt availability of contraceptive coverage and delay the implementation of the alternative opt-out for religious objectors. *See* 5 U.S.C. § 553(b)(3)(B) (good cause exists when "notice and public procedure are . . contrary to the public interest").

* * *

In sum, we reject all of Plaintiffs' challenges to the regulations. Accordingly, we affirm the district court's opinion in *Priests for Life* in its entirety. As to the *RCAW* decision, we vacate the district court's grant of summary judgment for Thomas Aquinas and its holding as to the unconstitutionality of the non-interference provision, and affirm the remainder of the decision.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368
Consolidated with 13-5371, 14-5021

[Filed November 14, 2014]

PRIESTS FOR LIFE, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Appeals from the United States District Court for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in case No. 13-5368 be affirmed; and the judgment of the District Court appealed from in case Nos. 13-5371 and 14-5021 be vacated with respect to the grant of summary judgment for Thomas Aquinas College and its holding as to the

unconstitutionality of the non-interference provision, and be affirmed as to the remainder of the decision, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/
Jennifer M. Clark
Deputy Clerk

Date: November 14, 2014

Opinion for the court filed by Circuit Judge Pillard.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-1261 (EGS)

[Filed December 19, 2013]

PRIESTS FOR LIFE, et al.,)
)
Plaintiffs,)
)
v)
)
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.)
)
Defendants.)

MEMORANDUM OPINION

This case presents one of many challenges to the contraceptive services mandate of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). A number of circuits, including the District of Columbia Circuit, have examined the mandate's requirements regarding contraceptive coverage for employees of for-profit companies; that issue is now pending before the Supreme Court. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, (10th Cir. 2013) (en banc), *cert. granted*, 2013 U.S. LEXIS 8418 (U.S. Nov. 26,

2013) (Case No. 13-354); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8418 (U.S. Nov. 26, 2013) (No. 13-354); *see also, e.g.*, *Gilardi v. United States Dep't of Health and Human Services*, 733 F.3d 1208 (D.C. Cir. 2013).

The instant case presents a different issue: the obligations, *vel non*, of non-profit religious organizations to provide contraceptive coverage under the mandate. These organizations are eligible for an accommodation to the mandate; specifically, they are not required to provide contraceptive coverage to their employees if they object to doing so on religious grounds. Under the regulations, an employer in this situation can self-certify to its health insurance issuer that it has a religious objection to providing coverage for contraceptive services as part of its health insurance plan. Once the issuer receives the self-certification, the non-profit organization is exempt from the mandate. The organization's employees will receive coverage for contraceptive services, but that coverage will be provided directly through the issuer. The coverage is excluded from the employer's plan of benefits, and the issuer assumes the full costs of coverage; it is prohibited from charging any co-payments, deductibles, fees, premium hikes or other costs to the organization or its employees.

Priests for Life, a non-profit organization which takes a "vocal and active role in the pro-life movement," Complaint ¶ 73, and three of its employees have filed this lawsuit objecting to the accommodation to the mandate. They allege that the self-certification Priests for Life must provide to its issuer violates their rights

under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. ("RFRA"), and the First and Fifth Amendments to the Constitution.

The Supreme Court has made clear that religious exercise is impermissibly burdened when government action compels individuals "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). At the same time, acts of third parties, which do not cause adherents to act in violation of their religious beliefs, do not constitute an impermissible burden. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). The right to religious freedom "simply cannot be understood to require the Government to conduct its [] affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious freedom is protected "in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. N'west Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988) (citations omitted).

Plaintiffs here do not allege that the self-certification itself violates their religious beliefs. To the contrary, the certification states that Priests for Life is opposed to providing contraceptive coverage, which is consistent with those beliefs. Indeed, during oral argument, plaintiffs stated that they have no religious objection to filling out the self-certification; it is the issuer's subsequent provision of coverage to which they object. But filling out the form is all that the ACA requires of the plaintiffs in this case.

There is no doubt that the plaintiffs find the statute's requirement that the issuer provide contraceptive coverage profoundly opposed to their religious scruples. But the issuer's provision of coverage is just that -- an entirely third party act. The *issuer's* provision of coverage does not require *plaintiffs* to "perform acts" at odds with their beliefs. *Yoder*, 406 U.S. at 218. Accordingly, the accommodations to the contraceptive services mandate do not violate their religious rights.

Pending before the Court is the plaintiffs' motion for summary judgment and the defendants' cross motion to dismiss or in the alternative for summary judgment. Upon consideration of the motions, the oppositions and replies thereto, the *Amicus Curiae* brief of the American Civil Liberties Union, the entire record, and for the reasons explained below, defendants' motion to dismiss is **GRANTED;** accordingly, the parties' motions for summary judgment are hereby **DENIED AS MOOT**.

I. BACKGROUND

Priests for Life is a non-profit corporation incorporated in the State of New York, and Father Frank Pavone, Alveda King, and Janet Morana are among its employees. Compl. ¶¶ 6-11. "A deep devotion to the Catholic faith is central to the mission of Priests for Life." Compl. ¶ 85. Its mission is to "unite and encourage all clergy to give special emphasis to the life issues in their ministry . [and] to help them take a more vocal and active role in the pro-life movement." Compl. ¶ 73. Accordingly, "contraception, sterilization,

abortifacients[1] and abortion are immoral and antithetical to Priests for Life's religious mission." *Id.* Priests for Life provides health insurance for its employees. Compl. ¶ 93. The next plan year will commence on January 1, 2014. Compl. ¶ 101.

Plaintiffs' claims arise out of certain regulations promulgated in connection with the ACA. The Act requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, for "women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]." 42 U.S.C. § 300gg-13(a)(4). The HRSA, an agency within the Department of Health and Human Services ("HHS"), commissioned the Institute of Medicine ("IOM") to conduct a study on preventive services. On August 1, 2011, HRSA adopted IOM's recommendation to include "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Dec. 17, 2013).

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[1] Plaintiffs use the word "abortifacient" to refer to drugs such as Plan B and Ella that they allege cause abortions. *See, e.g.*, Compl. ¶ 37. Plaintiffs do not allege that the regulations will require them to provide insurance coverage for the medical procedure of abortion.

Several exemptions and safe-harbor provisions excuse certain employers from providing group health plans that cover women's preventive services as defined by HHS regulations. First, the mandate does not apply to certain "grandfathered" health plans in which individuals were enrolled on March 23, 2010, the date the ACA was enacted. 75 Fed. Reg. 34,538 (June 17, 2010). Second, certain "religious employers" are excluded from the mandate. *See, e.g.*, 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A). On June 28, 2013, the government issued final rules on contraceptive coverage and religious organizations; the rules became effective August 1, 2013. 78 Fed. Reg. 39,870 (July 2, 2013). These regulations are the subject of this case.

Under the final regulations, a "religious employer" exempt from the contraceptive services mandate is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). Non-profit organizations which do not qualify for this exemption may, however, qualify for an accommodation with respect to the contraceptive coverage requirement if they are "eligible organizations" under the regulations. An "eligible organization" must satisfy the following criteria:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under

§ 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a non-profit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in the form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (1) through (3), and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.

Once an eligible organization provides a copy of a self-certification to its issuer, which provides coverage in connection with the group health plan, the organization is relieved of its obligation "to contract, arrange, pay or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The group health plan issuer which receives the self-certification form must (1) exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan, and (2) provide separate payments for any contraceptive services required to be covered for plan participants and beneficiaries. The issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance or a deductible) on plan participants or beneficiaries. 78 Fed. Reg. at 39,896. Likewise, the issuer is prohibited from imposing any

premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization or the group health plan. *Id.* Failure to self-certify or otherwise comply with the mandate will result in Priests for Life's issuer including contraceptive services within Priests for Life's healthcare policy, and charging the organization for such coverage.[2]

The parties agree that Priests for Life does not qualify for an exemption to the contraceptive services mandate. The grandfathered plans provision does not protect the organization because the current health insurance plan has made changes since 2010, including an increase in the percentage cost-sharing requirement. *See* Decl. of Fr. Pavone, ECF No. 7-1, at ¶ 5. Priests for Life also does not satisfy the definition of "religious employer" and is not eligible for an exemption on that ground. *Id.* at ¶ 3. Finally, the parties agree that Priests for Life would qualify as an

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[2] During the initial briefing, the parties stated that if Priests for Life refused the accommodation, it could be fined $100 per employee per day. 26 U.S.C. § 4980D. At oral argument, however, the government informed the court that the ACA imposes an independent obligation on insurers to sell policies which comply with the law, including, *e.g.*, coverage for contraceptive services. *See* Defs.' Suppl. Mem. at 1-4 [ECF No. 31], *citing* 42 U.S.C. §§ 300gg-13; 300gg-22; 76 Fed. Reg. 46,621, 623 (Aug. 3, 2011). This does not alter the analysis, however. Under the statute and regulations, if Priests for Life refuses the accommodation, it would then be placed in the position of providing contraceptive services to its employees as part of its plan of benefits, and paying for such services. As this Circuit held in *Gilardi*, this arrangement would substantially burden Plaintiffs' free exercise of religion. *Gilardi*, 733 F.3d at 1216-19.

"eligible organization," entitled to the accommodation, if it completes the self-certification form. Compl. ¶ 6.

Priests for Life states that completing the self-certification form will require it to violate its sincerely held religious beliefs because "the government mandate forces Priests for Life to provide the means and mechanism by which contraception, sterilization and abortifacients are provided to its employees. . . There is no logical or moral distinction between the [] contraceptive services mandate . and the "accommodation[.]" Priests for Life [is] still paying an insurer to provide [its] employees with access to a product [] that violates [its] religious convictions." Compl. ¶¶ 69-70, see also *id.* ¶ 105 ("Priests for Life objects to being forced by the government to purchase a health care plan that provides its employees with access to contraceptives, sterilization and abortifacients, all of which are prohibited by its religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life.").

On September 19, 2013, plaintiffs moved for a preliminary injunction as to all counts of the Complaint. On September 25, 2013, the parties agreed to consolidate the preliminary injunction motion with the merits under Federal Rule of Civil Procedure 65(a)(2). Thereafter, plaintiffs filed a motion for summary judgment and defendants filed a cross motion to dismiss or in the alternative for summary judgment. Toward the end of the briefing schedule set by the Court, the D.C. Circuit issued its decision in *Gilardi*, addressing religious freedom claims arising from different regulations under the ACA's contraceptive

services mandate. Following *Gilardi*, the Court ordered the parties to file supplemental briefs addressing its impact on this case. The Court heard oral argument on the parties' cross motions on December 9, 2013. The motions are ripe for determination by the Court.

II. STANDARD OF REVIEW

A. Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted; alteration in original). While detailed factual allegations are not necessary, plaintiffs must plead enough facts "to raise a right to relief above the speculative level." *Id.*

When ruling on a Rule 12(b)(6) motion, the court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F Supp. 2d 191, 196 (D.D.C. 2002). The Court must construe the complaint liberally in plaintiffs' favor and grant plaintiffs the benefit of all reasonable inferences deriving from the complaint. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court must not accept plaintiffs' inferences that are "unsupported by the facts set out in the complaint." *Id.* "Nor must the court

accept legal conclusions cast in the form of factual allegations." *Id.* "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

B. Motion for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotation marks omitted). To defeat summary judgment, the non-moving party must "designate specific facts showing there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). The existence of a factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the non-moving party; a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id.* at 248; *Laningham v. U.S. Navy,* 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party's motion, "[a]ll underlying facts and inferences are analyzed in the light most favorable to the non-moving party." *N.S. ex rel. Stein v. District of Columbia,* 709 F. Supp. 2d 57, 65 (D.D.C. 2010), citing *Anderson,* 477 U.S. at 247.

III. DISCUSSION

A. Standing

The parties do not dispute that Priests for Life, a non-profit religious organization, has standing to advance all of its constitutional and statutory claims. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381, 384 (1990); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467-70 (D.C. Cir. 1996). The Court, therefore, has jurisdiction to hear and decide the issues presented by this case. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

While the defendants challenge standing of the individual plaintiffs, they acknowledge that the individual plaintiffs' claims are identical to Priests for Life's claims. *See* Defs.' Combined Mot. to Dismiss or for Summ. J and Opp'n to Pls.' Mot. (hereinafter "Defs.' Mot.") at 13, n.8. At oral argument, the Case 1:13-cv-01261-EGS Document 36 Filed 12/19/13 Page 13 of 45 14 parties agreed that it is unnecessary for the Court to address the standing of the individual plaintiffs. *See, e.g., Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (it is unnecessary to address the standing of party whose presence or absence is immaterial to a suit's outcome, where another party clearly has standing) (citation omitted). Accordingly, because the presence of the individual plaintiffs has no impact on the merits of this case, the Court need not reach the issue of their standing.

B. The RFRA

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." Subsection (b) provides that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that the right to free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability, and explicitly disavowed the test used in earlier decisions, which prohibited the government from substantially burdening a plaintiff's religious exercise unless the government could show that its action served a compelling interest and was the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb. The purpose of the RFRA was to "restore the compelling interest test" as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id.*

In order to state a prima facie case under RFRA, and thus to survive a motion to dismiss, plaintiffs must allege a substantial burden on their religious exercise.

The statute defines "religious exercise" broadly, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4); 2000cc-5. The RFRA does not define "substantial burden," but because the RFRA intends to restore *Sherbert* and *Yoder*, those cases are instructive in determining the meaning of that term. In *Sherbert*, plaintiff's exercise of her religion was impermissibly burdened when plaintiff was forced "to choose between following the precepts of her religion," resting and not working on the Sabbath and forfeiting certain unemployment benefits as a result, or "abandoning one of the precepts of her religion in order to accept work." 374 U.S. at 404. In *Yoder*, the "impact of the compulsory [school] attendance law on respondents' practice of the Amish religion [was found to be] not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

This Circuit also recently addressed the issue of substantial burden in the context of a RFRA challenge to the ACA in *Gilardi*. The Gilardi brothers are the two owners of closely held for-profit companies. Their companies are not eligible for the accommodations available to Priests for Life; the regulations require such companies to provide contraceptive coverage for the participants and beneficiaries in their group health plans. The Gilardis challenged the provisions of the contraceptive mandate which would have required them to directly provide contraceptive coverage to their employees, claiming it substantially burdened their religious beliefs opposing contraception. The Circuit

agreed, finding that "the burden on religious exercise occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." 733 F.3d at 1217. "The contraceptive mandate," as applied to companies not eligible for the accommodations, "demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans." *Id.* at 1217-18.

Unlike the Gilardis, Priests for Life is eligible for the accommodations to the mandate, and therefore is not required to provide contraceptive services to its employees. To take advantage of the accommodations, Priests for Life will be required to provide its insurer with a self-certification form stating that it is a religious, non-profit organization which opposes providing coverage for some or all of any contraceptive services required to be covered by the mandate. 78 Fed. Reg. at 39,874, 39,892.[3] Plaintiffs argue that the self-

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[3] In addition, Priests for Life claims that it will be required to "identify its employees to its insurer for the distinct purpose of enabling and facilitating the government's objective of promoting the use of contraceptive services;" Pls.' Mot. for Prelim. Inj. at 7 (hereinafter "Pls.' Mot."); and "coordinate with its insurer when adding or removing employees and beneficiaries from its health care plan to ensure that these individuals receive coverage for contraceptive services," *id.* at 8. Plaintiffs provide no support for their claim that the challenged regulations require either of these things, and admitted at oral argument that Priests for Life must "identify" its employees to its insurer and "coordinate" with its insurer in order to provide its current health care plan to its

certification substantially burdens their exercise of religion because the accommodations require Priests for Life to "promote, facilitate and cooperate in the government's immoral objective to increase the use of contraceptive services in direct violation of Plaintiffs' sincerely held religious beliefs." Pls.' Mot. at 1. "[B]ecause Priests for Life provides its employees with a health care plan, the government mandate forces Priests for Life to provide the means and mechanism by which contraception, sterilization, and abortifacients (and related education and counseling) are provided to its employees (and beneficiaries), which is unacceptable to Plaintiffs because it violates their sincerely held religious beliefs." *Id.* at 9. "This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life." *Id.* at 15. In sum, Plaintiffs alleges they are pressured to choose between violating their religious beliefs by "support[ing] and provid[ing] access to" the services provided under the contraception mandate, or "leaving the health care insurance market altogether." *Id.* at 16.

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employees. Priests for Life also suggests, without support, that it will ultimately have to bear the costs of the contraceptive services mandate, because the insurance companies will somehow find a way to either raise premiums to cover the cost of such coverage, or fail to lower premiums to reflect the savings to the insurer by its provision of such coverage. Pls.' Mot. at 9, n.6, 10, n.7. The plain language of the regulations, however, prohibits insurers from passing along any costs of contraceptive coverage to eligible organizations such as Priests for Life, whether through cost-sharing, premiums, fees, or other charges. 78 Fed. Reg. at 39,875-77. The Court declines, therefore, to find a substantial burden exists on any of these grounds.

Defendants do not question the sincerity of Plaintiffs' religious beliefs, but they do dispute whether the accommodations impose a substantial burden on the exercise of those beliefs. Defendants argue that the regulations impose no more than a *de minimis* burden on Plaintiffs' religious exercise because the regulations "do not require Priests for Life to "modify [its] religious behavior in any way."" Defs.' Mot. at 15 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). Defendants contend that Priests for Life "is not required to contract, arrange, pay or refer for contraceptive coverage Priests for Life need not do anything more than it did prior to the promulgation of the challenged regulations – that is, to inform its issuer that it objects to providing contraceptive coverage in order to insure that it is not responsible for contracting, arranging, paying or referring for such coverage." *Id.* at 14-15. The self-certification form only "require[s] [Priests for Life] to inform its issuer that it objects to providing contraceptive coverage, which it has done . voluntarily anyway even absent these regulations" in order to insure that it does not provide such coverage. *Id.* 15-16. Accordingly, Defendants argue that completing the self-certification form "is at most, *de minimis*, and thus cannot be "substantial" under RFRA." *Id.* 17. For the reasons set forth below, the Court agrees with the government.

A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Gilardi*, 733 F.3d at 1216 (quoting *Kaemmerling*, 553 F.3d at 678); *see also Yoder*, 406 U.S. at 218 (law substantially burdens the exercise of religion if it compels individuals "to perform acts undeniably at odds with fundamental

tenets of their religious beliefs.") "An inconsequential or *de minimis* burden on religious practice does not rise to this level[.]" *Kaemmerling*, 553 F.3d at 678. Finally, an adherent is not substantially burdened by laws requiring third parties to conduct their internal affairs in ways that violate his beliefs. *Id.* at 679.

In *Kaemmerling*, a federal prisoner claimed that the statutorily mandated collection and use of his DNA for purposes of a national law enforcement database substantially burdened his free exercise rights. Kaemmerling alleged that the collection, storage, and use of his DNA violated his sincerely held religious beliefs. The D.C. Circuit "accept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature," 553 F.3d at 679. The Court further noted that the government commanded compliance with the statute; failure to cooperate with collection of a fluid sample from which the DNA would be isolated is a misdemeanor offense. *Id.* at 673. Nevertheless, the Court rejected his RFRA claim because the government was not forcing him to modify his own behavior. The Court explained:

> Kaemmerling does not allege facts sufficient to state a substantial burden . because he cannot identify any "exercise" which is the subject of the burden to which he objects. The extraction and storage of DNA information are entirely the activities of the FBI, in which Kaemmerling plays no role and which occur after the [prison] has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to

modify his religious behavior in any way – it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the [prison] takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

Kaemmerling alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform. Religious exercise necessarily involves an action or practice, as in *Sherbert*, where the denial of unemployment benefits "impede[d] the observance" of the plaintiff's religion by pressuring her to work on Saturday in violation of the tenets of her religion, 374 U.S. at 404, or in *Yoder*, where the compulsory education law compelled the Amish to "perform acts undeniably at odds with fundamental tenets of their religious beliefs," 406 U.S. at 218. Kaemmerling, in contrast, alleges that the DNA Act's requirement that the federal government collect and store his DNA information requires the government to act in ways that violate his religious beliefs, but he suggests no way in which these governmental acts pressure him to modify his own behavior in any way that would violate his beliefs. *See* Appellant's Br. at 21 (describing alleged substantial burden as "knowing [his] strongly held beliefs had been

> violated by a[n] unholy act of an oppressive regime").

553 F.3d at 679.[4] The *Kaemmerling* court relied on *Bowen v. Roy*, in which a Native American man objected to the states' use of his child's Social Security number in determining eligibility for welfare benefits. The parents objected to a statutory requirement that state agencies "shall utilize" Social Security numbers "not because it place[d] any restriction on what [the father] may believe or what he may do, but because he believes the use of the number," a governmental act, "may harm his daughter's spirit." 476 U.S. 693, 699 (1986). The Supreme Court concluded that the government's use of the child's Social Security number did not impair her parents' freedom to exercise their religion.

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the

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[4] Other Circuits have also emphasized the requirement that an adherent be pressured to modify his own conduct in order to show a substantial burden on religious exercise. *See, e.g.*, *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc) (to establish a substantial burden under RFRA, governmental action must "coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, [or] condition a governmental benefit upon conduct that would violate their religious beliefs."); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("within the meaning of RFRA, a substantial burden on religious exercise is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to these beliefs.") (internal citation omitted).

> individual believes will further his or her spiritual development or that of his or her family. The Free Exercise clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. [A]ppellees may not demand that the Government join in their chosen religious preferences by refraining from using a number to identify their daughter.

Id. at 699-700. Other Supreme Court decisions have similarly rejected free exercise challenges to laws which would not require a plaintiff to modify his own behavior, but would permit a third party to engage in behavior to which the plaintiff objects on religious grounds. In *Lyng*, the Court rejected Native American tribes' challenge to government building roads and harvesting timber on national forest land used by the tribes for religious purposes. The Court explained "government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not violate the First Amendment. 485 U.S. 439, 450 (1988). "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government . . ." *Id.* at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

In this case, the Court does not doubt the sincerity of Plaintiffs' beliefs, nor does it doubt that condemnation of contraception is central to their exercise of the Catholic religion. "It is not within the

judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989). However, to prevail under the substantial burden test Plaintiffs must show more than a governmental action that violates their sincerely held religious beliefs; they must show that the governmental action forces Priests for Life, itself, to modify its own behavior in violation of those beliefs. *Kaemmerling*, 553 F.3d at 679.[5] This is where Plaintiffs' RFRA challenge must fail--like the challenges in *Kaemmerling* and *Bowen*, the accommodations to the contraceptive mandate simply do not require Plaintiffs to modify their religious behavior. The accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party –

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[5] For this reason, *inter alia*, the Court is not persuaded by the rationale articulated in two recent cases that a plaintiff can meet his burden of establishing that the accommodation creates a "substantial burden" upon his exercise of religion simply because he claims it to be so. *See Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 U.S. Dist. LEXIS 176432, *44 (E.D.N.Y. Dec. 13, 2013) (stating that plaintiffs "consider [completing the self-certification] to be an endorsement of [contraceptive services] coverage to which they object; to them, the self-certification compels affirmation of a repugnant belief. It is not for this Court to say otherwise."); *see also Zubik v. Sebelius*, No. 13-1459, 2013 U.S. Dist. LEXIS 165922, *79-*82 (W.D. Pa. Nov. 21, 2013) (reaching the same conclusion). In this Court's view, those opinions misconceive RFRA's substantial burden test, which requires courts to "accept as true the factual allegations that [a plaintiff's] beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Kaemmerling*, 553 F.3d at 679.

namely, the issuer – and Priests for Life plays no role in that activity. As in *Kaemmerling*, "[a]lthough the [third party]'s activities may offend [plaintiff's] religious beliefs, they cannot be said to hamper [his] religious exercise." 553 F.3d at 679.

Priests for Life attempts to distinguish *Kaemmerling* on the grounds that Mr. Kaemmerling did not object to the government taking his fluid, hair, or tissue samples; he only objected to the subsequent extraction and storage of his DNA. Priests for Life claims that in this case, "the coverage for the morally objectionable contraceptive coverage will occur *only* because Priests for Life has played an *active role* in purchasing a healthcare plan and then authorizing the issuer of its plan through "self-certification" to provide the objectionable coverage directly to its plan participants and beneficiaries (a role that is prohibited by Plaintiffs' religion) and thereby cooperating with and thus facilitating the government's illicit objective "to increase access to and utilization of" contraceptive services (cooperation that is prohibited by Plaintiffs' religion)." Pls.' Combined Opp'n to Govt's Mot./Reply in Support of Pls.' Mot. (hereinafter "Pls.' Opp'n/Reply") at 23 (emphasis in original). The Court does not find this distinction to be meaningful. The governmental action in *Kaemmerling* could not have occurred without the plaintiff playing an active role by providing a blood sample. Nevertheless, the court rejected claims that his action constituted a substantial burden because the action did not, in and of itself, violate plaintiff's religious beliefs. The fact that government action thereafter was deeply offensive to his beliefs did not give rise to a RFRA claim. *See Kaemmerling*, 553 F.3d at 679 (plaintiff's knowledge that his "strongly held

beliefs had been violated by a[n] unholy act of an oppressive regime" was not enough to violate the RFRA because the government's actions do not "pressure him to modify his own behavior in any way that would violate his beliefs."); *see also Bowen*, 476 U.S. at 699-700 (rejecting plaintiff's challenge to the government's use of his daughter's Social Security number because it "may harm his daughter's spirit. . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.")

In this case, Plaintiffs assert an objection to a single requirement the regulations impose on Priests for Life directly: completing a self-certification form stating that it is a non-profit religious organization which objects to providing contraceptive services coverage. Pls.' Mot. at 7. However, during oral argument Plaintiffs conceded that they have no religious objection to the self-certification form, in and of itself. Rather, Plaintiffs' act under the accommodations becomes burdensome only when it is characterized as "cooperating" with or providing "authorization" for "the government's illicit goal of increasing access to and utilization of contraceptive services." Pls.' Opp'n/Reply at 23. But no matter how religiously offensive the statutory or regulatory objective may be, the law does not violate RFRA unless it coerces individuals into acting contrary to their religious beliefs. *See Lyng*, 458 U.S. at 450. In this case, it is only the subsequent actions of third parties – the government's and the issuer's provision of contraceptive services, in which Priests for Life plays no role – that animate its religious objections. Under *Bowen* and *Kaemmerling*,

however, RFRA does not permit Plaintiffs to proscribe the conduct of others.

Plaintiffs' reliance on *Sherbert*, *Yoder*, and *Thomas* is unavailing. Pls.' Mot. at 21. Plaintiffs argue that these cases, particularly *Thomas*, established that the impact of a "substantial burden" need not be direct. *Id.* at 20. In each of these cases, however, the burdens of the governmental action – denial of unemployment benefits for refusal to work on the Sabbath or in an armaments factory, threatened criminal prosecution for refusing to send children to school – all fell directly upon the plaintiffs' participation in or abstention from a specific religious practice. That is not the case here; once again, the only action required of Priests for Life under the accommodations is *consistent* with its beliefs. It is only the independent actions of third parties which result in the availability of contraceptive services. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 415 & n.15 (E.D. Pa. 2013) (explaining that while an indirect *compulsion* may constitute a substantial burden, legislation which imposes only an indirect *burden* on the exercise of religion does not), *aff'd* 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 2013 U.S. LEXIS 8418 (U.S. Nov. 26, 2013) (No. 13-354).[6]

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[6] The Court is not persuaded by the rationale in *Archdiocese of N.Y.*, which states that completing the self-certification form, itself, amounts to a substantial burden on the plaintiffs' exercise of religion, because if they do not complete the form, they are subject to penalties or other forms of government coercion. *See, Roman Catholic Archdiocese of N.Y.*, 2013 U.S. Dist. LEXIS 176432, *32 (stating that RFRA's "substantial burden" test is met by a finding that plaintiffs face "substantial pressure" to comply with the law.) The Court agrees with the reasoning of *Kaemmerling*, which, in the Court's view, correctly interpreted

This Circuit's recent decision in *Gilardi* does not alter the analysis. In *Gilardi*, the plaintiffs themselves (through their companies) had to provide contraceptive coverage for the participants and beneficiaries of their plan. The Circuit explained that the Gilardis were substantially burdened when they had to place contraceptive coverage into "the basket of goods and services that constitute [their companies'] healthcare plan." *Gilardi*, 733 F.3d at 1218. The Circuit repeated the nature of the burden later in the opinion, defining the burden as a "demand[] that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement . is a "compel[led] affirmation of a repugnant belief."" *Id.* at 1218 (quoting *Sherbert*, 374 U.S. at 402). Priests for Life need do none of those things. It need not place contraceptive coverage into "the basket of goods and services that constitute its healthcare plan," nor must it even *permit*, much less "approve and endorse" such coverage in its plan. *Gilardi*, 733 F.3d at 1217. On the contrary, Priests for Life need only reaffirm its religiously based opposition to providing contraceptive coverage, at which point third parties will provide the coverage separate and apart from Priests For Life's plan of benefits. In the Court's view, the Circuit's holding on

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Sherbert, *Yoder* and *Thomas* to hold that even a threat of criminal sanction did not amount to a substantial burden when it did not impact plaintiff's religious exercise. *Kaemmerling*, 553 F.3d at 679 ("Although the [third party]'s activities . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper [his] religious exercise.")

the issue of substantial burden in *Gilardi* is distinguishable from this case.

For the foregoing reasons, the Court finds that Plaintiffs have not stated a *prima facie* case under RFRA because they have not alleged a substantial burden on their religious exercise. Therefore, Count II of the Complaint will be dismissed for failure to state a claim.

C. **The Free Exercise Clause**

The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694, 702 (2012). The right of free exercise protected by the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted). A law is not neutral "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious beliefs." *Id.* at 543.

This Court agrees with the vast majority of courts which have considered the issue and found that the contraceptive services regulations are neutral and generally applicable, and accordingly have rejected Free Exercise Clause challenges. *See* Defs.' Mot. at 32 n.5 (citing, e.g., *MK Chambers Co. v. U.S. Dep't of*

Health & Human Servs., U.S. Dist. LEXIS 47887, *13-15 Case No. 13-11379 (E.D. Mich. Apr. 3, 2013); *Conestoga*, 917 F. Supp. 2d at 409-10; *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093, *23, Case No. 12-1906 (W.D. Mich., Dec. 24, 2012), *aff'd* 730 F.3d 618 (6th Cir. 2013), *petition for cert. filed*, (U.S. Oct. 15, 2013) (No. 13-482); *Hobby Lobby*, 870 F Supp. 2d 1278, 1289-90 (W.D. Okl. 2012) *rev'd on other grounds*, 723 F.3d 1114). Although these cases do not specifically address the accommodations to the mandate at issue here, nothing about the specific regulations governing the accommodations leads to a different result.

Plaintiffs do not dispute that the regulations' stated purpose is secular: to promote public health and gender equality. Nevertheless, they argue that the mandate, and its accommodations, is not neutral because it was "designed to target employers who refuse to provide contraceptive services to their employees based on the employers' religious beliefs." Pls.' Mot. for Prelim. Inj. 23-24. They cite the exemption for "religious employers" as defined by 45 C.F.R. § 147.131(a), which applies only to houses of worship and their integrated auxiliaries, but not to other religious organizations, and argue that the exemption divides religious objectors into favored and disfavored groups without any secular purpose. Pls.' Mot. at 24.

As several other courts considering the issue have found, "carving out an exemption for defined religious entities does not make a law nonneutral as to others." *Hobby Lobby*, 870 F. Supp. 2d at 1289 (W.D. Okl. 2012). In other words, the neutral purpose of the regulations – to make contraceptive coverage available to women – is not altered because the legislature chose

to exempt some religious institutions and not others. On the contrary, "the religious employer exemption presents a strong argument in favor of neutrality, demonstrating that the "object of the law" was not to "infringe upon or restrict practices because of their religious motivation."" *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F Supp. 2d 1149, 1161 (E.D. Mo. 2012) (quoting *Lukumi*, 508 U.S. at 533); *see also Catholic Charities of Diocese of Albany v. Serio*, 7 N.E.2d 510, 522 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007) (rejecting Free Exercise Clause challenge to state law requiring contraceptive coverage on grounds that the law exempted some, but not all, religious institutions. "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."). Indeed, Priests for Life itself is the beneficiary of an accommodation to the regulations, which was enacted for the purpose of *alleviating* any burden on its religious practice.

Plaintiffs argue that a statement in the Overview of the Final Regulations authorizing the religious employer exemption from the mandate reveals a discriminatory intent toward all employers which oppose contraceptive coverage and which do not qualify for the exemption.

> A group health plan qualifies for the [religious employer] exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of that organization . Employers that do not

> primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.

Pls.' Mot. at 5, 24 (*quoting* 77 Fed. Reg. 8724, 8728). For the reasons just discussed, this comment lacks significance in the context of a Free Exercise Clause claim. It merely explains that the regulations confer the special benefit of an exemption only for those religious organizations that are essentially houses of worship and their integrated auxiliaries, and who therefore may be permitted to give employment preference to members of their own religion. *See, e.g.*, 42 U.S.C. § 2000e-1(a). That benefit, as discussed above, "is justifiable as a legislative accommodation--an effort to alleviate a governmentally imposed burden on religious exercise." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 85 (Cal. 2004). Those non-profit religious organizations that do not qualify for the exemption but nevertheless are opposed to contraceptive services, like Priests for Life, are also eligible for an accommodation. Finally, employers that do not qualify for an exemption or accommodation are subject to the contraceptive services mandate in the same manner as all other employers, whether religious or non-religious. Accordingly, while the regulations "treat some [] employers" with religious objections to

contraceptive coverage "more favorably than other employers, it does not under any circumstance treat [employers with religious objections] less favorably than any other employers." 85 P.3d at 85. Therefore, Plaintiffs' neutrality argument fails.

Plaintiffs also claim that the law is not one of general applicability because "Congress has permitted exemptions from the requirements of the Act," including those for grandfathered plans and certain religious employers. Pls.' Mot. at 24. The existence of categorical exemptions, however, does not mean that the law does not apply generally. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (finding social security tax requirements generally applicable despite existence of categorical exemptions). As the Supreme Court has held, laws are not generally applicable when they "in a selective manner impose burdens only on conduct motivated by religious beliefs." *Lukumi,* 508 U.S. at 543 (invalidating statute which prohibited only the religious practice of animal sacrifice, but not hunting or other secular practices involving killing of animals). The regulations in this case do not impose burdens selectively; they apply to all non-exempt employers, regardless of their religious beliefs. See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) ("pharmacists who do not have a religious objection to [filling prescriptions for contraceptives] must comply with the rules to the same extent—no more and no less—than pharmacists who may have a religious objection to [filling the prescriptions]. Therefore, the rules are generally applicable.") And again, to the extent the accommodation alters the analysis, it promotes, not restricts, the free exercise of

religion by excusing from compliance employers such as Priests for Life due to their religious beliefs.

Accordingly, the Court concludes that the regulations, and the accommodations, do not violate the Free Exercise Clause. Therefore, Count I of the Complaint will be dismissed for failure to state a claim.

D. Freedom of Speech and Expressive Association

Plaintiffs next argue that the accommodation to the contraceptive services mandate violates their right to Free Speech and Expressive Association under the First Amendment. They claim the accommodation compels speech, in violation of their deeply held religious beliefs, by requiring them to complete the self-certification form, which then leads to Priests for Life's insurer providing contraceptive coverage. Pls.' Mot. at 31. They claim the same requirement violates their right to associate, which they do for the purpose of expressing a "message that *rejects* the promotion and use of contraceptive services." *Id.* at 29.

As Defendants point out, "every court to review a Free Speech challenge to the prior contraceptive-coverage regulations has rejected it." Defs.' Mot. at 35 (citing, e.g., *MK Chambers Co.*, 2013 U.S. Dist. LEXIS 47887, *15-17; *Conestoga*, 917 F. Supp. 2d at 418; *Autocam*, 2012 U.S. Dist. LEXIS 184093, *23-*25). These cases rely on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ("*FAIR*"), a case Plaintiffs do not address. In *FAIR*, the Court rejected a free speech and expressive association challenge to the Solomon Amendment, a statute that conditioned federal funding to law schools upon their agreement to permit military

recruiters on campus. The Court found that the statute "neither limits what law schools may say nor requires them to say anything. Law schools remain free . to express whatever views they may have on the military the [statute] regulates conduct – not speech. It affects what law schools must *do* – afford access to military recruiters – not what they may or may not say." *FAIR*, 547 U.S. at 60. The Court found that to the extent that complying with the Amendment required the school to speak, such as by sending emails or posting notices on behalf of military recruiters, such speech was "plainly incidental to the regulation of conduct." *Id.* at 62. "It has never been deemed an abridgment of freedom of speech . . to make a course of conduct illegal merely because such conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (citation omitted).

A similar analysis applies to this case. The regulations regarding contraceptive coverage, including the accommodation, place no limits on what Plaintiffs may say; they remain free to oppose contraceptive coverage for all people and in all forms. Rather, the accommodation regulates conduct; specifically, the conduct of Priests for Life's insurance provider. And like the law schools in *FAIR*, the only speech the accommodations require of Priests for Life is incidental to the regulation of conduct. Priests for Life's speech in this case is its self-certification that it opposes contraceptive coverage. This speech is necessary only because it is attendant to the regulation of conduct, specifically, the insurance company's provision of contraceptive services. Indeed, the speech at issue in this case is even farther from a First Amendment

violation than the speech in *FAIR*; in that case, the speech was incidental to the law schools' conduct, while in this case the speech is incidental to the conduct of a wholly separate entity. And in any event, the speech at issue here is in *accordance* with Priests for Life's religious beliefs, not fundamentally opposed to it. *Cf. West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943) (invalidating state law requiring Jehovah's Witness schoolchildren to recite the Pledge of Allegiance and to salute the flag); *Wooley v. Maynard,* 430 U.S. 705 (1977), (striking down law that required Jehovah's Witnesses to display the state motto—"Live Free or Die"—on their license plates).

Plaintiffs argue strenuously in their motion that because opposition to contraception is a fundamental part of their organizational message, any provision of contraceptive coverage by any other party must necessarily interfere with that message and therefore be considered compelled speech. See Pls.' Mot. at 28-32. But this is not the test for compelled speech in violation of the First Amendment. As the Court held in *FAIR*, one speaker who is forced to host another speaker's message may only assert a compelled-speech violation when the message it is forced to host is "inherently expressive." *FAIR*, 547 U.S. at 64. For example, the "expressive nature of a parade" was a key part of the holding in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568 (1995). Likewise, in *Pacific Gas and Electric Company v. Public Utility Commission of California*, 475 U.S. 1 (1986), the compelled inclusion of a third party newsletter along with Pacific Gas's own newsletter "interfered with the utility's ability to communicate its own message in its newsletter." *FAIR*, 547 U.S. at 64.

By contrast, there is nothing inherently expressive about Priests For Life's *insurer*, wholly separate from Priests for Life, providing contraceptive coverage, just as there is nothing inherently expressive about a law school's decision to allow recruiters on campus. *Id.*, see also *Autocam Corp. v. Sebelius*, 2012 U.S. Dist. LEXIS 184093, *23.[7]

Plaintiffs' expressive association claim is also devoid of merit. The government violates expressive association rights under the First Amendment by directly interfering with an association's composition by forcing them to accept members or hire employees who would "significantly affect [the association's] expression," *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000). It may also infringe on the freedom of expressive association by passing laws requiring disclosure of anonymous membership lists, or imposing penalties or withholding benefits based on membership

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[7] Priests for Life also argues that the ACA's requirement that contraceptive coverage include patient education and counseling for women constitutes prohibited speech because it advocates a particular viewpoint or content. See Pls.' Opp'n/Reply at 28. This Court agrees with the *Conestoga* court, which considered and rejected the same argument, explaining, "[w]hile the regulations mandate that [insurance companies] provide coverage for "education and counseling for women with reproductive capacity," which may include information about the contraceptives which Plaintiffs believe to be immoral, they are silent with respect to the content of the counseling given to a patient by her doctor. . As such, it cannot be said that Plaintiffs are being required to [host] the advocacy of a viewpoint with which they disagree. Plaintiffs' concern that a doctor may, in some instances, provide advice to a patient that differs from [plaintiffs'] religious beliefs is not one protected by the First Amendment." *Conestoga*, 917 F. Supp. 2d at 419 (internal citations omitted).

in a disfavored group. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982); *Healy v. James*, 408 U.S. 169, 180-84 (1972). These laws were invalidated because they "made group membership less attractive, raising [] First Amendment concerns affecting the group's ability to express its message." *FAIR*, 547 U.S. at 69. By contrast, the presence of military recruiters on a law school campus "has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." *Id.* at 69-70.

As in *FAIR*, the regulations and accommodations do not violate Plaintiffs' right to associate. The regulations and accommodations in no way restrict Priests for Life's members, employees, and donors from associating to express their opposition to contraception. Nothing about the regulations or the accommodations force Plaintiffs to accept members or employees it does not desire, nor do they make group membership less desirable as in *Socialist Workers '74* or in *Healy*. Like the plaintiffs in *FAIR*, there can be no doubt that Plaintiffs find the content of the regulations repugnant to their religious beliefs. See Compl. at ¶¶ 87-8, 90 (explaining its beliefs that access to contraception "harms women," is "gravely immoral," and "a grave sin."). However, the fact that a third party provides contraceptive coverage to Priests for Life's employees, separate from Priests for Life or its employer-sponsored

health plan, does not affect the group's ability to express its message under the First Amendment, and therefore does not violate its associational rights.

The government has not compelled plaintiffs to speak, nor has it violated their rights to expressive association. Accordingly, Count III of the Complaint will be dismissed.

E. Establishment Clause and Equal Protection Clause

The Establishment Clause prohibits the government from showing a preference for any religious denomination over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Plaintiffs claim that the contraceptive services mandate, its exemption for religious employers, and its accommodations create an impermissible government preference in favor of churches and religious orders over other religious organizations. Pls.' Opp'n/Reply at 29-30. As with Plaintiffs' Free Speech/ Expressive Association Claim, defendants point out that every court to consider an Establishment Clause challenge to the contraceptive services mandate has rejected it. Defs.' Mot. at 39 (citing, e.g., *O'Brien*, 894 F. Supp. 2d at 1162; *Conestoga*, 917 F Supp. 2d at 416-17). As these courts found, the regulations permit the government to distinguish between religious organizations based on structure and purpose when granting religious accommodations, which is not prohibited under the

Establishment Clause. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1163-4 (collecting cases).[8]

Plaintiffs do not address this authority. The crux of their argument rests on a statement in the Overview of the Final Regulations authorizing the religious employer exemption from the mandate, which states in relevant part:

> A group health plan qualifies for the [religious employer] exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of that organization . . Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.

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[8] Plaintiffs claim that under *Larson*, the government is prohibited from making other distinctions among types of religious institutions, in addition to denominational preferences. Pls.' Opp'n/Reply at 31-32. Plaintiffs misread *Larson*. The *Larson* court invalidated the statute at issue not because it distinguished between different types of organizations based on their structure or purpose, but rather because it "was drafted with the explicit intention of including particular religious denominations and excluding others." 456 U.S. at 254.

Pls.' Mot. at 35 (*quoting* 77 Fed. Reg. at 8728); Pls.' Opp'n/Reply at 33 (same). The Court has already considered this statement in the context of Plaintiffs' Free Exercise Clause challenge and found it constitutionally permissible. See *supra* at III.C. Nor does it violate the Establishment Clause, because it delineates the contours of a religious accommodation that applies equally to organizations of every faith and does not favor any denomination over another. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (rejecting Establishment Clause challenge to law exempting from property taxes property of religious organizations used exclusively for religious worship); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (upholding Social Security tax exemption only for members of organized religious sects, despite the fact that "some individuals receive exemptions, and other individuals with identical beliefs do not," because the purpose of the exemption was not to discriminate among religious denominations).

Plaintiffs' Equal Protection claim is identical to its other First Amendment Claims: they claim the regulations, religious employer exemption and accommodation impinge on Priests for Life's fundamental right to free exercise of religion, freedom of speech and expressive association. Pls.' Mot. at 33. The Court has already rejected these underlying claims, however. "Where a plaintiff's First Amendment free exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005) (citing *Locke v. Davey*, 540 U.S. 712, 721 (2004).

Applying rational basis scrutiny to the fundamental rights-based claim that the regulations violate equal protection, the Court has no trouble determining that the contraceptive services mandate is rationally related to the legitimate government purposes of promoting public health and gender equality. *See, e.g.*, *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Indeed, Plaintiffs do not argue that the regulations would fail such review.

The Plaintiffs have failed to state a claim under the Establishment Clause or the Equal Protection Clause. Therefore, Counts IV and V will be dismissed.

IV. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss all counts of Plaintiffs' Complaint is **GRANTED**; accordingly, the parties' cross motions for summary judgment are **DENIED AS MOOT.** An appropriate Order accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
December 19, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-1261 (EGS)

[Filed December 19, 2013]

PRIESTS FOR LIFE, et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.)
)
Defendants.)

ORDER

For the reasons stated in the accompanying Memorandum Opinion filed on this day, it is hereby

ORDERED that defendants' Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that the parties' cross motions for summary judgment are **DENIED AS MOOT.**

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 19, 2013

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368
Consolidated with 13-5371, 14-5021

[Filed May 20, 2015]

PRIESTS FOR LIFE, ET AL.,
APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLEES

Appeals from the United States District Court for the District of Columbia
(No. 1:13-cv-01261)
(No. 1:13-cv-01441)

On Petition for Rehearing En Banc

BEFORE: GARLAND, *Chief Judge*; HENDERSON, ROGERS, TATEL, BROWN**, GRIFFITH, KAVANAUGH**, SRINIVASAN*, MILLETT*, PILLARD, AND WILKINS, *Circuit Judges*.

ORDER

Appellants/cross-appellees' joint petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested.

Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Deputy Clerk

* Circuit Judges Srinivasan and Millett did not participate in this matter.

** Circuit Judges Brown and Kavanaugh would grant the petition.

A statement by Circuit Judge Pillard, joined by Circuit Judges Rogers and Wilkins, concurring in the denial of rehearing en banc, is attached.

A statement by Circuit Judge Brown, joined by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

A statement by Circuit Judge Kavanaugh, dissenting from the denial of rehearing en banc, is attached.

PILLARD, *Circuit Judge*, joined by ROGERS and WILKINS, *Circuit Judges*, concurring in the denial of rehearing en banc: A majority of the court has voted to deny the petition for rehearing en banc in this case. In two thoughtful opinions, Judge Kavanaugh, and Judge Brown joined by Judge Henderson, dissent from that

denial. The panel's opinion speaks at length to the issues they take up. The panel members write further only to underscore why our court's approach accords with the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

The dissenters and we agree that the Religious Freedom Restoration Act provides robust protection for religious liberty—without regard to whether others might view an adherent's beliefs or practices as irrational, trivial, or wrong. Nothing in our opinion should be seen to detract from that vital guarantee. Where we part ways is that the dissenters perceive in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works. They believe we ignored that prerogative here. The dissenters read more into the Supreme Court's decision than it supports. *Hobby Lobby* embraced adherents' claim about the religious meaning of the undisputed operation of a federal regulation; this case involves a claim that courts must credit religious adherents' incorrect assertions about how a different federal regulation operates. Because *Hobby Lobby* did not address that distinct issue, we see no conflict.

The Court in *Hobby Lobby* invalidated the requirement that closely-held, for-profit businesses with religious objections to contraception nonetheless must buy health-insurance coverage for their employees that pays for contraception, or else face taxes or penalties. 134 S. Ct. at 2759. No opt out was available to those businesses. The parties in *Hobby Lobby* did not dispute what the law required, nor its

practical effects: All agreed that the Affordable Care Act regulations mandated that employer-sponsored health plans include contraception, and that as a result plaintiffs' employees got access to contraception paid for, in part, by their employers. *See id.* at 2762. What the parties in *Hobby Lobby* contested were the moral and religious implications of the businesses' conceded role. The plaintiff business owners believed that "providing the coverage demanded is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Id.* at 2778. The government disagreed, contending that employees' intervening choices whether to use contraception broke the chain of moral culpability, and hence the law did not substantially burden the businesses' religious exercise. *Id.* at 2777-78.

In rejecting the government's position in *Hobby Lobby*, the Supreme Court emphasized that courts may not second-guess religious beliefs about the wrongfulness of facilitating another person's immoral act. *Id.* at 2778. RFRA forbids courts from "provid[ing] a binding national answer to . religious and philosophical question[s]" or "tell[ing] the plaintiffs that their beliefs are flawed." *Id.*; *see also id.* at 2779 ("[I]t is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function in this context is to determine' whether the line drawn reflects 'an honest conviction.'" (alteration marks omitted) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981))). The context makes clear that the Court's discussion of facilitation simply restates the basic tenet of the religious freedom cases that judges may not question the correctness of a plaintiff's religious beliefs.

That reasoning is inapplicable here. The dispute between the government and the Plaintiffs in this case, unlike in *Hobby Lobby*, is not about religious implications of acknowledged—but perhaps attenuated—support for contraceptive use; the parties disagree here about how the law functions, and therefore whether there is any causal connection at all between employers' opt-out notice and employees' access to contraception. Plaintiffs challenge the accommodation, not available in *Hobby Lobby*, based on their assertion that what causes their employees to receive contraceptive coverage is their compliance with the accommodation's precondition that they give notice of their sincere religious objections to such coverage. As Plaintiffs characterize it, their act of excusing themselves from legal liability for not providing contraceptive coverage is what made such coverage available to employees, and hence violated their Catholic faith.

We held that Plaintiffs miscast the accommodation. The regulation allows Plaintiffs to continue to do just what they did before the ACA: notify their insurers of their sincere religious objection to contraception, and arrange for contraception to be excluded from the health insurance coverage they provide.[1] As before,

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[1] Judge Kavanaugh is perplexed as to why, if not for an impermissible reason, the government requires any form at all. Kavanaugh Dissent at 12-13 & n.5. The form is far from "meaningless," *id.*, because it acts as "the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out," and extricates those objectors in a manner consistent with the contraceptive coverage requirement. *Priests for Life v. U.S. Dep't of Health & Human*

insurers may sell plans that exclude contraception to their religious-nonprofit customers. The difference is that now the ACA and its regulations require that contraceptive coverage be provided to all insured women. In the case of women who get their insurance coverage through an accommodated employer, the law requires insurers to offer the women contraception under a separate plan—completely segregated from the objecting employer's plan and its payments.

The judges who urge us to rehear the case say that *Hobby Lobby* leaves no room for us to question Plaintiffs' characterization of how the challenged regulations operate, including their assertions that the regulations force Plaintiffs to facilitate the provision of

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Servs., 772 F.3d 229, 250 (D.C. Cir. 2014). Only once an insurer becomes aware of the employer's religious objection can it take the steps needed to effectuate the opt out, such as: exclude contraceptive coverage from the employer's group health plan, prevent the employer's payment from funding contraception, notify the beneficiaries that the employer plays no role in administering or funding contraceptive coverage, and arrange for separate mailings and accounting. *Id.* (citing regulatory provisions). Judge Kavanaugh would hold that including the insurer's identity in the form is unnecessarily restrictive of religious exercise because, extending our metaphor, he says it requires the objecting employer "both to raise its hand *and* to point to its insurer." Kavanaugh Dissent at 24 n.11. But it is more apt to say that, if the employer opts to raise its hand where the insurer cannot see it (*i.e.* via the alternative notice delivered to the government rather than the insurer, *see* 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)), the government must be in a position promptly to communicate the religious objection to the insurer, or else the employer's insurance plan will continue to include contraceptive coverage. An insurer that is kept in the dark about an employer's religious objections cannot do what it must to honor the opt out.

contraception. As they read it, *Hobby Lobby* forbids a court deciding a claim under RFRA to assess whether a plaintiff's belief about what a law requires him to do is correct. *See, e.g.*, Kavanaugh Dissent at 8-11; Brown Dissent at 10-12. Both dissents argue that *Hobby Lobby*'s discussion of facilitation requires us simply to accept whatever beliefs a RFRA plaintiff avows—even erroneous beliefs about what a challenged regulation actually requires.

Neither the holding nor the reasoning of *Hobby Lobby* made that leap. RFRA understandably accorded Hobby Lobby Stores a victory in a contest over what *religious meaning* to ascribe to the Stores' payment for contraceptive coverage. That holding does not require us to credit Priests for Life's legally inaccurate assertions about the *operation of the regulation* they challenge. *See Univ. of Notre Dame v. Burwell*, No. 13-3853, slip op. at 11, 15 (7th Cir. May 19, 2015); *see also id.* at 34 (Hamilton, J., concurring). *But see id.* at 44-46 (Flaum, J., dissenting). Our panel opinion explains that it is the mandate on insurers that causes Plaintiffs' employees to receive contraceptive coverage, and not anything Plaintiffs are required to do in claiming their accommodation. The panel thus held that Plaintiffs suffered no substantial burden triggering RFRA strict scrutiny.

The dispute we resolved is legal, not religious. Under the ACA regulations, a woman who obtains health insurance coverage through her employer is no more entitled to contraceptive coverage if her employer submits the disputed notice than if it does not. The ACA obligation to provide contraceptive coverage to all insured women does not depend on that notice. Nothing

in RFRA requires that we accept Plaintiffs' assertions to the contrary.

RFRA protects religious exercise. In no respect do we, nor could we, question Plaintiffs' sincere beliefs about what their faith permits and forbids of them. But we can and must decide which party is right about how the law works. We concluded that the regulation challenged in this case does not, as a matter of law or fact, give Plaintiffs' conduct the contraception-facilitating effect of which they complain. Indeed, it bears emphasis that the whole point of the challenged regulation is to scrupulously shield objecting religious nonprofits from any role in making contraception available to women. The accommodation is itself evidence of the fundamental commitment of this Nation to religious freedom that RFRA embodies. The regulation is, of course, properly subject to judicial scrutiny to verify that it comports with governing law, including *Hobby Lobby*. Because we conclude that it does, we believe that en banc review is not warranted in this case.

BROWN, *Circuit Judge*, with whom HENDERSON, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc: The French say: *plus ça change et plus c'est la même chose. The more things change; the more they remain the same.* There was once a time when the church was the state and the church as the state embodied all hope of human well-being. R.W. SOUTHERN, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES 23 (1970). To challenge the church was to undermine civilization. Thus, the imposition of

orthodoxy was deemed necessary, and dissent, which amounted to heresy, was met with coercion and violence. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ pt. II-II, q. 11, art. 3.

This history prompted John Locke to urge toleration and stress the necessity of distinguishing "the business of civil government from that of religion" and establishing clear boundaries between them. John Locke, *A Letter Concerning Toleration*, reprinted in 5 THE WORKS OF JOHN LOCKE 5, 9 (12th ed. 1824). The Framers went further, establishing not only a limited government, but recognizing the primacy of individual conscience and seeking the line between freedom and justice. Thus, the Bill of Rights "grew in soil which also produced a philosophy that . liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 639–40 (1943). The federal government was given no authority over men's souls. For the Founders, the not-so-distant history of persecution engendered a fierce commitment to each individual's natural and inalienable right to believe according to his "conviction and conscience" and to exercise his religion "as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

Of course, the right to freely exercise one's religion is not—and was not intended to be—absolute. The Founders recognized state coercion would at times be necessary, with Madison himself stating "full and free exercise . . . according to the dictates of conscience" could be limited where "the preservation of equal liberty and the existence of the [government] may be manifestly endangered." G. Hunt, *Madison and Religious Liberty*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, H.R. Doc. No. 702, 57th Cong., 1st Sess., 163, 166–67 (1901). However, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The soil of the eighteenth century has eroded and that fixed star grown surprisingly dim. We live in a time where progress is sought "through expanded and strengthened governmental controls." *Barnette*, 319 U.S. at 640. In a sense the government now fills the role formerly occupied by the church, embodying the hope of human well-being. For the government to pursue the good and to solve society's problems, it must first identify that which is good and that which is problematic through subjective and value-laden judgments. *Cf.* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 651–53 (2001) (stating that when the government takes a side in a "direct clash of competing images of 'the good life,'" it "is making an intrinsically contestable statement about the rightness or wrongness" of ideals). Consequently, orthodoxy has been rehabilitated, and dissent from the government's

determinations may be quelled through coercion—onerous fines or banishment from commerce and the public square.

Despite the parallels, we do not find ourselves full circle quite yet. Religious adherents may still seek refuge from unnecessary governmental coercion through the Religious Freedom Restoration Act ("RFRA"). When the federal government substantially burdens free exercise, it may do so only in pursuit of a compelling interest and even then must use the least restrictive means. 42 U.S.C. § 2000bb-1. Further, the conscience of the individual remains protected in that he must "answer to no man for the verity of his religious views." *United States v. Ballard*, 322 U.S. 78, 87 (1944). But, in our respectful view, the panel in this case failed to apply these protections. The panel conceded Plaintiffs sincerely "believe that the regulatory framework makes them complicit in the provision of contraception," Slip Op. at 27 (quoting *Mich. Catholic Conf. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014), *vacated and remanded*, No. 14-701, 2015 WL 1879768, at *1 (U.S. Apr. 27, 2015)). That acknowledgement should end our inquiry into the substance of their beliefs. Viewed objectively, Plaintiffs' belief that the acts the regulations compel them to perform would facilitate access to contraception in a manner that violates the teachings of their Church may "seem incredible, if not preposterous," to some people. *Ballard*, 322 U.S. at 87. However, this Court is neither qualified nor authorized to so scrutinize any religious belief. The panel trespassed into an area of inquiry Supreme Court precedent forecloses. It then proceeded to accept evidence that is insufficient under the rulings of the Supreme Court to find the purported compelling

interest. For these reasons we believe this exceptionally important case is worthy of en banc review.

I

We begin by addressing the panel's opening observations and by making some of our own with the hopes of distinguishing between fact and fancy. First, this case is not about denying any woman access to contraception. A woman's right to obtain and use contraception was recognized long ago, and nothing about this case calls for the issue to be revisited. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

Second, this case is about the religious freedom of these religiously-affiliated organizations and not about the free exercise concerns of the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In that case, the Supreme Court found the Department of Health and Human Services' ("HHS") approach to religious nonprofits demonstrated there were less restrictive means available to deal with conscientious objectors among for-profit corporations. *Id.* at 2781–82. The Court expressly reserved judgment on whether HHS's approach "complies with RFRA for purposes of all religious claims." *Id.* at 2782. While the government's approach to religious non-profits may—or may not—fully put to rest the *Hobby Lobby* plaintiffs' religious objections, that is irrelevant to our consideration of the religious objections put forth by Plaintiffs in this case. The present Plaintiffs are entitled to their own personal beliefs.

Third, this case is not "paradoxical" because Plaintiffs object to regulatory requirements the

government intended as a religious accommodation. Slip Op. at 24 (quoting *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *vacated and remanded*, 135 S. Ct. 1528 (2015)). That the government's expressed intent in enacting the regulations at issue was to allay religious adherents' concerns about the contraception mandate is not determinative of the ultimate question of whether Plaintiffs were in fact accommodated. Where the government imposes a substantial burden on religious exercise and labels it an "accommodation," that burden is surely as distressing to adherents as it would be if imposed without such a designation. Therefore, heightened skepticism is not appropriate. We should look at Plaintiffs' claims as we would any RFRA claim. After all, in the substantial burden analysis, the government's motivations—no matter how benevolent—are irrelevant; we ask only whether the government's action operates to place "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

Fourth, this case is not one in which Plaintiffs' "only harm . . is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." Slip Op. at 24. The regulations compel Plaintiffs to take actions they believe would amount to "impermissibly facilitating access to abortion-inducing products, contraceptives, and sterilization" in violation of their religious tenets. Pet. for Reh'g En Banc at 1. Make no mistake: the harm Plaintiffs complain of—and the harm this Court therefore is called to assess—is from their inability to conform *their own* actions and

inactions to their religious beliefs without facing massive penalties from the government.

II

The panel's substantial burden analysis is inconsistent with the precedent of the Supreme Court and this Court, which identifies both permissible and impermissible lines of inquiry in the substantial burden analysis of a RFRA claim.

A

As we have recognized, whether a burden is "substantial" for purposes of RFRA is a question of law for the court to answer, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Relying on longstanding precedent, the Supreme Court recently described permissible lines of inquiry for a court to pursue in determining whether an adherent's religious exercise has been substantially burdened, both in *Hobby Lobby* and in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a case involving the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc et seq, (RLUIPA).[1] The plaintiff bears 'the initial burden of proving [the law or regulation at issue] implicates his religious exercise." *Holt*, 135 S. Ct. at 862. While RFRA forecloses asking whether the

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[1] RLUIPA "targets two areas of state and local action: land use regulation, 42 U.S.C. § 2000cc (RLUIPA § 2), and restrictions on the religious exercise of institutionalized persons, § 2000cc–1 (RLUIPA § 3)." *Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011). It "borrows important elements from RFRA . but is less sweeping in scope." *Id.*

exercise is "compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), the court does ask whether the plaintiff's beliefs are sincere. The answer is no if his claims are not "sincerely based on a religious belief" but instead on "some other motivation." *Holt*, 135 S. Ct. at 862; *see also Hobby Lobby*, 134 S. Ct. at 2774 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere.'").

Next, the plaintiff bears the "burden of proving that the [law or regulation] substantially burden[s] that exercise of religion." *Holt*, 135 S. Ct. at 862. The court asks whether he has been "put[] to th[e] choice" of either "'engag[ing] in conduct that seriously violates [his] religious beliefs" or facing "serious" consequences. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2775); *see also Thomas*, 450 U.S. at 718 (stating a substantial burden exists when the government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs"). The answer is no if the plaintiff can identify "no [compelled] action or forbearance on his part." *Kaemmerling*, 553 F.3d at 679 (plaintiff objecting to the government's extraction of DNA information from fluid or tissue samples but not to providing DNA samples); *see also Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (plaintiff objecting to the government's independent utilization of his daughter's social security number, which he himself was not required to provide or use). The answer is also no where the pressure being placed upon a person to act contrary to his beliefs or the consequences he faces for not doing so are not substantial. *See Thomas*, 450 U.S. at 717 (assessing the "coercive impact" of being "put to a choice between fidelity to religious belief or cessation of work"). Finally, this Court has "inquir[ed] into the

importance of a religious practice" to the individual. *Henderson v. Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (denying rehearing en banc). In doing so, we have found no substantial burden exists where a regulation is "at most a restriction on one of a multitude of means" for an individual to engage in his desired religious exercise. *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (the plaintiffs could spread the gospel any number of ways, just not the prohibited means of selling t-shirts on the National Mall); *see also Mahoney*, 642 F.3d at 1120–21 (the plaintiff had ample alternative means of spreading his religious message besides chalking the sidewalk in front of the White House).[2]

Here, Plaintiffs' faith compels them to provide their employees and students with health insurance plans. Oral Arg. Tr. at 19:5–15. Their religious beliefs forbid them not only from providing or paying for contraception, but also from facilitating its provision. Pls. Br. at 15. Plaintiffs therefore believe they exercise their religion by providing health insurance plans that do not facilitate access to contraception. *Id.* at 11-12, 15, 24–25. In determining whether an act constitutes impermissible facilitation Plaintiffs are informed by "the Catholic doctrines of material cooperation and scandal." *Id.* at 36. The sincerity of Plaintiffs' beliefs has not been questioned. Slip Op. at 26.

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[2] While the propriety of this sort of inquiry in pure free exercise cases is arguably called into question by recent Supreme Court precedent, *see Holt*, 135 S. Ct. at 862, it is not relevant to this case. That the practice Plaintiffs defend here is of sufficient importance to them to form the basis of a substantial burden under RFRA has not been questioned.

Plaintiffs identify at least two acts that the regulations compel them to perform that they believe would violate their religious obligations: (1) "hiring or maintaining a contractual relationship with any company required, authorized, or incentivized to provide contraceptive coverage to beneficiaries enrolled in Plaintiffs' health plans," Pet. for Reh'g En Banc at 3; and (2) "filing the self-certification or notification," *id.* at 4. Plaintiffs have therefore shown both that they are being compelled to modify their behavior and that, if undertaken, the modification would be a violation of their religious beliefs. They are unlike the plaintiffs in *Kaemmerling* and *Bowen*, as they have shown they are themselves being compelled to modify their behavior.

If Plaintiffs do not act in violation of their beliefs, however, they face two alternatives. First, they may offer coverage that does not include contraceptives and face onerous fines. 26 U.S.C. § 4980D(b)(1). Alternatively, they may stop providing health insurance altogether, which would also be a violation of their religious beliefs. Oral Arg. Tr. at 19:5–15. Imposing such harsh consequences certainly substantially pressures Plaintiffs to alter their behavior in a way inconsistent with their religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2759 (stating if "heavy" financial penalties "do not amount to a substantial burden, it is hard to see what would"). Plaintiffs have therefore demonstrated their free exercise is substantially burdened: they are being "put[] to [the] choice" of either "'engag[ing] in conduct that seriously violates [their sincere] religious beliefs'" or facing "serious" consequences. *Holt*, 135 S. Ct. at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

B

The panel's opinion parts ways with precedent by wading into impermissible lines of inquiry. The panel did not dispute that federal law operates to compel Plaintiffs to maintain a relationship with an issuer or TPA that will provide the contraceptive coverage and to execute the self-certification or alternative notice. Their disagreement with Plaintiffs is about the *significance* of those compelled acts; in other words, the panel rejected the "adherents' claim about the religious meaning of the undisputed operation of [] federal regulation[s]." Concurring Op. at 1; *see also Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring) (disposing of the argument that the plaintiff's complaint should "fail[] because [the plaintiff] holds an erroneous legal opinion about how the contraception mandate works" because the plaintiff "offer[ed] no evidence that its complaint turns on the advice of counsel" but instead offered "undisputed declarations about the ancient teachings of the Catholic Church"). With a thorough analysis of the regulations, the panel determined they "do not compel" Plaintiffs to "provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church." Slip Op. at 26 (quoting Pls.' Br. at 15). The panel explained the regulations allow Plaintiffs to "wash[] their hands of any involvement in providing insurance coverage for contraceptive services." *Id.* Therefore, the panel concluded, Plaintiffs have been subjected to only to a *de minimis* burden of completing a form, and their RFRA claim fails. *Id.* at 31.

In declaring that—contrary to Catholic Plaintiffs' contentions—it would be consistent with the teaching of the Catholic Church for Plaintiffs to comply with the regulations the panel exceeded both the "judicial function and [the] judicial competence." *Thomas*, 450 U.S. at 716. What amounts to "facilitating immoral conduct," Pet. for Reh'g En Banc at 1, "scandal," *id.* at 7, and "material" or "impermissible cooperation with evil," *id.*; Slip Op. at 14, are inherently theological questions which objective legal analysis cannot resolve and which "federal courts have no business addressing." *Hobby Lobby,* 134 S. Ct. at 2778; *see also id.* (stating "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another" is "a difficult and important question of religion and moral philosophy"). The causal connection sufficient to create impermissible "facilitation" in the eyes of a religious group may be very different from what constitutes proximate cause in the common law tradition. *See Univ. of Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."). Likewise, where civil authorities may conclude an individual has "wash[ed his] hands of any involvement," Slip Op. at 26, adherents of a faith may examine the same situation and, in their religious judgment, reach the opposite conclusion. Pontius Pilate, too, washed his hands, but perhaps he perceived the stain of complicity remained. *See Matthew* 27:24.

Under the panel's analysis, it seems no claim of substantial burden may prevail where the religious significance of conduct under scripture as interpreted

by a faith tradition differs from the legal significance of that conduct under the laws of the United States as interpreted by federal judges. But RFRA would be an exceedingly shallow—perhaps nonexistent—protection of religious exercise if adherents were only permitted to give the same meaning to their actions or inactions as does the secular law.

Plaintiffs, including an Archbishop and two Catholic institutions of higher learning, say compliance with the regulations would facilitate access to contraception in violation of the teachings of the Catholic Church. What law or precedent grants this Court authority to conduct an independent inquiry into the correctness of this belief? Instead, where one sincerely believes performing certain acts would cause him to cross the line between permissible behavior and sin, the Supreme Court has instructed, "it is not for us to say that the line he drew was an unreasonable one." *Hobby Lobby*, 134 S. Ct. at 2778 (quoting *Thomas*, 450 U.S. at 715). Plaintiffs' sincere determination about the obligations their religion imposes is between them and their God and need not be "acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection." *Thomas*, 450 U.S. at 714. This is so even when, in the government's opinion, Plaintiffs' determination is based on a misunderstanding of the nature of their legal obligations, their religious obligations, or both—as the two could certainly overlap.[3] RFRA's concern is with the *sincerity* of

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[3] Confusion remains as to the legal obligations the regulations impose on third party administrators ("TPAs"). In *Wheaton College v. Burwell*, Justice Sotomayor explained a TPA does not have an independent obligation but instead "bears the legal obligation to

religious beliefs and not their *accuracy*. For example in *United States v. Lee*, Mr. Lee claimed he could not pay social security taxes without violating an obligation under his Amish faith to care for fellow church members. 455 U.S. 252, 257 (1982). The Supreme Court refused to consider the government's argument that paying social security taxes did not actually interfere with exercise of this belief, as the Amish would remain free to care for their own community if they paid social security taxes but did not collect benefits. *Id.* Instead the Court simply accepted Mr. Lee's "contention that both payment and receipt of social security benefits is

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provide contraceptive coverage only upon receipt of a valid self-certification." 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (citing 26 C.F.R. § 54.9815–2713A(b)(2) (2013); 29 C.F.R. § 2510.3–16(b)(2013)). Even evaluating the new regulations as supplemented in light of the Supreme Court's ruling in *Wheaton College*, the panel did not identify any scenario under which a TPA is obligated to provide contraceptive coverage until the TPA is designated a "plan administrator" for purposes of ERISA. Slip Op. 41–43. As the regulations currently stand, this designation occurs only after a religious nonprofit has either completed the self-certification form or the alternative notice and after the TPA agrees to enter into or remain in a contractual relationship with the nonprofit organization. *See* 26 C.F.R. § 54.9815-2713AT(b)(2) (2014) ("*If* a third party administrator *receives* a copy of the self-certification from an eligible organization or a notification from the Department of Labor [sent after the religious nonprofit provides notice of its objection to the Department] *and agrees* to enter into or remain in a contractual relationship with the eligible organization the third party administrator shall provide or arrange for payments of contraceptive services .") (emphasis added). If the panel relied on a mistaken assumption about the regulations imposing an independent obligation on TPAs to provide contraceptive coverage, rehearing en banc is all the more warranted.

forbidden by the Amish faith," explaining "[c]ourts are not arbiters of scriptural interpretation." *Id.* (quoting *Thomas*, 450 U.S. at 716).

The panel's analysis further parts ways with precedent by recasting Plaintiffs' objection to the facilitation of access as an objection to the conduct of third parties. Slip Op. at 34. The panel relied on *Bowen* and *Kaemmerling* to find Plaintiffs may not object "to the role of [their] action in the broader regulatory scheme." Slip Op. at 35. There are two problems with this analysis. First, in this case the government is requiring *Plaintiffs* to perform objectionable acts. In contrast, the *Bowen* and *Kaemmerling* plaintiffs' objections were to the *government's* actions. *See Bowen*, 476 U.S. at 699–700; *Kaemmerling*, 553 F.3d at 678. The claims in *Bowen* and *Kaemmerling* are different in kind from a claim that the government is compelling the individual *himself* to undertake actions he believes are sinful.

Second, the actions to which Plaintiffs object—which may seem innocent if examined devoid of context—must be understood in light of the broader regulatory scheme. When the Supreme Court has considered claims involving beliefs about facilitation of immoral conduct, it has not employed the panel's approach of requiring the adherent to view their own actions in isolation. Instead the Court found a substantial burden where the plaintiffs were compelled to take actions they believed to be impermissible based on the actions' place in a chain of events. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759 (the plaintiffs objected to providing access to abortifacients because *others'* use of the drugs may result in the destruction of a human

embryo); *Thomas*, 450 U.S. at 710 (plaintiff objected to fabricating turrets because those turrets would then be affixed by *others* to military tanks and used by *others* in warfare). This makes good sense, as the concept of facilitation inherently involves a view of one's conduct in relation to that of others' Logic and precedent therefore compel us to permit persons to object to performing an act that would be itself innocent but for its illicit consequences. Plaintiffs object to maintaining a relationship with an issuer or third-party administrator ("TPA") that will use Plaintiffs' health insurance plans as vehicles to provide contraceptive coverage. They object to completing, as the panel describes it, an "opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage." Slip Op. at 36. Such claims do not fall outside the purview of RFRA.

III

As Plaintiffs have demonstrated a substantial burden on their free exercise, the government may only prevail by demonstrating the regulations further a compelling interest and employ the least restrictive means of doing so. 42 U.S.C. § 2000bb–1. A compelling interest is an interest "of the highest order." *Yoder*, 406 U.S. at 215. To satisfy strict scrutiny, the government must "specifically identify an actual problem in need of solving" and the burden on free exercise "must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations and quotations omitted). The panel found the government demonstrated a compelling interest in "seamless provision of contraceptive services." Slip Op. at 49. The panel then rejected any less restrictive

means of providing contraceptive coverage without cost sharing that would require women to complete additional steps to obtain the coverage, explaining such means "make the coverage no longer seamless from the beneficiaries' perspective." *Id.* at 24.

Even assuming for the sake of argument that the government possesses a compelling interest in the provision of contraceptive coverage without cost sharing, it has not succeeded in demonstrating a compelling interest in the "seamless" provision of coverage. The government has pointed to no evidence in the record demonstrating its purported interest in providing contraceptive coverage without cost-sharing is harmed when women must undergo additional administrative steps to receive the coverage. The government cites only to one page in the Federal Register to support the proposition that coverage must be provided seamlessly.[4] Gov't Supp. Br. at 20 (citing 78 Fed. Reg. 39,870, 39,888 (Jul. 2, 2013)). This page provides no evidence that a procedure under which individuals must take additional steps to receive contraceptive coverage poses a "problem in need of solving," but instead offers only conclusory and unsubstantiated statements that surely cannot be sufficient for the government to meet its burden in strict scrutiny analysis. That "additional steps" would

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[4] The government also references pages of a 2011 Institute of Medicine Report entitled, "Clinical Preventative Services for Women: Closing the Gaps." Gov't Supp. Br. at 20 (citing pages 103–07). These pages of the report discuss benefits of contraceptive services and do not reference, much less weigh, the comparative advantage or disadvantage of procedures for accessing those services.

be so burdensome as to hinder women's access to contraception is pure speculation. For example, if all that was required was that the employee or student fills out a "simple, one-step form," that would be a "*de minimis* requirement" to which we assume the panel would have no objection. Slip Op. at 26, 31, *see also Roman Catholic Archdiocese of New York v. Sebelius*, 987 F. Supp. 2d 232, 256 (E.D.N.Y. 2013) ("If these steps only entail filling out a form, it seems that the burden of filling out that form should fall on those who have no religious objection to doing so.").

Further, the government cannot meet its burden of demonstrating a compelling interest where it leaves "appreciable damage to [the] supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (stating a law's purpose is undermined when it is "so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous"). As the panel notes, the Affordable Care Act permits employers to "ceas[e] to offer health insurance as an employment benefit, and instead pay[] the shared responsibility assessment and leav[e] the employees to obtain subsidized health care coverage on an insurance exchange." Slip Op. at 23. While Plaintiffs state they cannot exercise this option without violating their religious obligations, Oral Arg. Tr. at 19:5–15, the panel nevertheless reminds them it would be acceptable under the law. Slip Op. at 23. The untold many whose employers provide no health insurance and instead pay the assessment must face "logistical, informational, and administrative burdens," *id.* at 63,

in arranging for subsidized coverage on a health insurance exchange. They must "take steps to learn about, and to sign up for," 78 Fed. Reg. at 39,888, health insurance on their own. The government simply cannot argue with a straight face that women who gain access to contraceptive coverage by identifying and signing up for a subsidized health insurance plan on a government exchange receive that coverage "seamlessly." *Cf. Hobby Lobby*, 134 S. Ct. at 2783. Therefore, in leaving "appreciable damage" to its "supposedly vital interest" in seamless provision of contraceptive coverage, the government's regulations cannot survive strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *Fla. Star*, 491 U.S. at 542 (Scalia, J., concurring)).

The question of least restrictive means then becomes the other side of the same coin. The government could treat employees whose employers do not provide complete coverage for religious reasons the same as it does employees whose employers provide no coverage. This would entail providing for subsidized—or in this case free—contraceptive coverage to be made available on health care exchanges. An employee of a religious objector then would face the same administrative burdens as those who find complete coverage—including contraceptive services coverage—on the exchanges. However, just like others who use the exchanges, after overcoming these administrative hurdles, employees of religious objectors would have contraceptive coverage without cost sharing. Such a mechanism would therefore be effective and would minimize the burden on religious adherents, demonstrating its viability as a less restrictive means than the current regulations.

IV

The Supreme Court has interpreted the First Amendment to deprive individuals of constitutional protection against neutral laws—meaning almost any law where the government does not announce its intention "to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye,* 508 U.S. at 533. Genuine neutrality, however, would "allow[] many different and contending voices to be represented in public discourse." Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV 1243, 1262 (2000). When the state quells disparate voices, declaring a winner on one side of the culture wars, neutrality becomes a proxy for majoritarianism and secularism. *Id.*

Priests for Life is an organization that exists solely for the purpose of countering the benign narrative that contraception and abortion are beneficial to women. The other Plaintiffs exist, at least in part, to engender a counter-cultural narrative that "life begins at the moment of conception . and that certain 'preventative' services that interfere with conception or terminate a pregnancy are immoral." Pls. Br. at 15. Those who accept employment with these organizations and students who enroll at these schools do so with full awareness of their mediating stance. Nevertheless, though the government acknowledges that a primary goal of such organizations is to oppose the government's mission of increasing access to and use of contraception, it places them outside its grudging religious exemption and offers only one real choice—they can renounce their religious scruples

overtly or in practical effect. If the government coopts their contractors and administrative structures to dispense advice, drugs, and services that contravene their religious views, in effect, it has written contraceptive care, including access to abortifacients, into Plaintiffs' employment contracts and student health care agreements. Commandeering is not accommodation, and, in this context, "seamlessness" is just shorthand for surrender.

The French have another saying, mocking the Bourbon restoration: *ils n'ont rien appris, ni rien oublié. Learning nothing and forgetting nothing*. The modern maxim does the Bourbon monarchs one better: learning nothing and forgetting everything. Alas, preserving the fragile ark of our constitutionalism requires us to remember that the first principle of liberty is freedom from gratuitous coercion. We respectfully dissent.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc: In my respectful view, the panel opinion misapplies the Religious Freedom Restoration Act and contradicts the Supreme Court's recent decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014). I would grant rehearing en banc and rule for the plaintiff religious organizations.

At the outset, it is important to recognize that two of the key Supreme Court precedents here – *Hobby*

Lobby and *Wheaton College* – were divided decisions with vigorous dissents. Some believe that those two decisions tilted too far in the direction of religious freedom. Others, by contrast, think that those decisions did not go far enough in the direction of religious freedom. We are a lower court in a hierarchical judicial system headed by "one supreme Court." U.S. Const. art. III, § 1. It is not our job to re-litigate or trim or expand Supreme Court decisions. Our job is to follow them as closely and carefully and dispassionately as we can. Doing so here, in my respectful view, leads to the conclusion that the plaintiff religious organizations should ultimately prevail on their RFRA claim, but not to the full extent that they seek.

Some background: The Affordable Care Act requires most employers, including non-profit organizations, to provide health insurance coverage for their employees or else pay a significant monetary penalty to the Government. By regulation, that insurance must cover all FDA-approved contraceptives, including certain methods of birth control that, some believe, operate as abortifacients and result in the destruction of embryos.

As a religious accommodation, the regulations exempt religious non-profit organizations from the contraceptive mandate. To be exempt from the monetary penalty, however, the religious organizations must either submit a form with certain required information to their insurer or submit a letter with certain required information to the Secretary of Health and Human Services.[1] (For ease of reference, I will use

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[1] The form submitted to a religious organization's insurer must certify that the organization (1) opposes providing coverage for

the term "form" to cover both documents.) The insurer must continue to provide contraceptive coverage to the religious organizations' employees, albeit with separate funds provided either by the insurer itself or by the United States.

Many prominent religious organizations around the country – including the plaintiffs in this case – have bitterly objected to this scheme. They complain that submitting the required form contravenes their religious beliefs because doing so, in their view, makes them complicit in providing coverage for contraceptives, including some that they believe operate as abortifacients. They say that the significant monetary penalty for failure to submit the form constitutes a substantial burden on their exercise of

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some or all of the contraceptive services required by the contraceptive mandate on account of religious objections; (2) is organized and operates as a non-profit entity; and (3) holds itself out as a religious organization. *See* 29 C.F.R. § 2590.715-2713A(a), (b)(1)(ii), (c)(1); 45 C.F.R. § 147.131(b), (c)(1). In certain circumstances, the form must also "include notice" of the insurer's obligations to provide contraceptive coverage to the religious organization's employees. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A).

The letter to the Secretary of Health and Human Services must include the following information: (1) the name of the religious non-profit organization; (2) the basis on which it qualifies for an accommodation; (3) its objection based on sincerely held religious beliefs to providing coverage for some or all contraceptive services, including notice of the subset of contraceptive services to which it objects; (4) its insurance plan's name and type; and (5) the name and contact information for any of the insurance plan's third party administrators and health insurance issuers. *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii); Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014).

religion. They contend, moreover, that the Government has less restrictive ways of ensuring that the employees of the religious organizations have access to contraception without making the organizations complicit in the scheme in this way.

The plaintiffs in this case have sued under the Religious Freedom Restoration Act, known as RFRA. RFRA grants individuals and organizations an exemption from generally applicable federal laws that "substantially burden" their "exercise of religion," unless the Government demonstrates that the law furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1.[2] As the Supreme Court has explained, "RFRA was designed to provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2767, slip op. at 17. RFRA statutorily incorporated the compelling interest test that the Supreme Court had applied in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1).

Under RFRA and the relevant Supreme Court case law, we must consider three questions here. First, do the regulations – which compel religious organizations to submit the required form or else pay significant monetary penalties – "substantially burden" the

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[2] The relevant section of RFRA provides in full: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

religious organizations' "exercise of religion"? Second, if so, does the Government have a "compelling" interest in facilitating access to contraception for the employees of these religious organizations? Third, if the Government does have such a compelling interest, do the regulations represent the "least restrictive" means of furthering that interest?

I conclude as follows:

First, under *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties.

Second, that said, *Hobby Lobby* strongly suggests that the Government has a compelling interest in facilitating access to contraception for the employees of these religious organizations.

Third, this case therefore comes down to the least restrictive means question. Under *Hobby Lobby*, *Wheaton College*, and *Little Sisters of the Poor*, requiring the religious organizations to submit this form is not the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees. Rather, the Government can achieve its interest even if it accepts the less restrictive notice that the Supreme Court has already relied on in the *Wheaton College* and *Little Sisters of the Poor* cases. Unlike the form required by current federal regulations, the *Wheaton College/Little Sisters of the Poor* notice does not require a religious organization to identify or notify its insurer,

and thus lessens the religious organization's complicity in what it considers to be wrongful. And even with just the *Wheaton College/Little Sisters of the Poor* notice, the Government can independently determine the identity of the organization's insurer and thereby ensure that the same insurer continues to provide the same contraceptive coverage to the organization's employees. Hence, the *Wheaton College/Little Sisters of the Poor* notice is a less restrictive way for the Government to achieve its compelling interest.

I

First, under *Hobby Lobby*, this regulatory scheme imposes a substantial burden on plaintiffs' exercise of religion.

Under RFRA, a substantial burden on the exercise of religion occurs when, for example, the Government imposes sanctions or punishment on someone, or denies a benefit to someone, for exercising his or her religion. Thus, if the Government requires someone (under threat of incurring monetary sanctions or punishment, or of having a benefit denied) to act or to refrain from acting in violation of his or her sincere religious beliefs, that constitutes a substantial burden on the exercise of religion. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-79, slip op. at 31-38 (2014); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

That is precisely what has happened here.

The "substantial burden" in this case comes from the large monetary penalty imposed on religious organizations that choose not to submit the required

form. *Cf. Hobby Lobby*, 134 S. Ct. at 2775-76, 2779, slip op. at 31-32, 38. It is settled that a direct monetary penalty on the exercise of religion constitutes a "substantial burden." *See id.* (penalty for not providing contraceptive coverage); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218-19 (1972) (fine for not sending children to high school); *Sherbert*, 374 U.S. at 404 (describing hypothetical fine for Saturday worship).[3]

Therefore, the remaining question with respect to the first prong of the RFRA analysis is whether submitting the form actually contravenes plaintiffs' sincere religious beliefs. In analyzing that question, we must first understand the context in which the question arises. In most religious liberty cases, the Government has said in essence: "Do X or suffer a

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[3] The Supreme Court has determined that denying benefits to (and not just imposing penalties on) someone engaged in conduct mandated by religious belief imposes a substantial burden on the exercise of religion. In denial-of-benefits cases, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718. Congress incorporated that broad understanding of substantial burden into RFRA. Of course, the question of indirect burdens from the denial of government benefits is not at issue in this case. Here, we have the classic direct monetary penalty compelling conduct that contravenes religious belief. There has never been a question that such a direct penalty imposes a substantial burden on the exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2775-76, 2779, slip op. at 31-32, 38; *Yoder*, 406 U.S. at 208, 218; *Sherbert*, 374 U.S. at 404. Put simply, it is black-letter law that a "substantial burden" on the exercise of religion occurs when, as here, the government "compel[s] someone to do something that violates his religious beliefs, or prohibit[s] someone from doing something that is mandated by his religious beliefs." Eugene Volokh, *The First Amendment and Related Statutes* 1060 (5th ed. 2014).

penalty." The religious objector responds that X violates his or her religious beliefs. For example, in the recent *Holt v. Hobbs* case, it was "shave your beard or suffer a penalty." *See Holt v. Hobbs*, 135 S. Ct. 853, 860-61, slip op. at 4 (2015). Or in the classic *Wisconsin v. Yoder* case, it was "send your children to high school or pay a $5 fine." *See* 406 U.S. at 208. Or in *United States v. Lee*, it was "pay the Social Security tax or suffer a penalty." *See* 455 U.S. 252, 254-55 (1982). Simple enough.

Here, the situation is only slightly more complicated. The Government has said in essence: "Do X or Y or suffer a penalty." X is provide contraceptive coverage. Y is submit the form. All agree that X – providing contraceptive coverage – implicates plaintiffs' "exercise of religion." But religious organizations can avoid that option by choosing Y – submitting the form. In other words, the Government is exempting religious organizations from providing contraceptive coverage but is still saying: "Submit the form or suffer a penalty."

As a result, the key inquiry under the first prong of RFRA is whether submitting the form violates plaintiffs' sincere religious beliefs. The form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees. To plaintiffs, the act of "submitting" this form would, "in their religious judgment, impermissibly facilitate[] delivery" of contraceptive and abortifacient coverage. Plaintiffs' Supplemental Br. 1.

As the Supreme Court stated in *Hobby Lobby*, such a question of complicity – that is, when "it is wrong for

a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another" – is "a difficult and important question of religion and moral philosophy." *Hobby Lobby*, 134 S. Ct. at 2778, slip op. at 36. Judge Gorsuch has explained well the complicity issue that arises in these circumstances: "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. [Plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).

But what if the religious organizations are misguided in thinking that this scheme – in which the form is part of the process by which the Government ensures contraceptive coverage – makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA. The Supreme Court has emphasized that judges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief. *See Hobby Lobby*, 134 S. Ct. at 2774 n.28, 2777-79, slip op. at 29 n.28, 35-38; *see also*

Thomas, 450 U.S. at 714-16.[4] The Supreme Court has long stated, moreover, that religious beliefs need not be

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[4] In that regard, it is important to note at least three limits on a claimant's ability to prevail under RFRA.

First, RFRA does not provide protection to philosophical, policy, political, or personal beliefs, for example. It protects only religious beliefs. 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's *exercise of religion* even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.") (emphasis added).

Second, RFRA does not cover *insincere* religious beliefs – that is, beliefs that are not truly held – such as when someone asserts a personal objection dressed up as a religious objection. Under RFRA, the courts must police sincerity. As the Supreme Court has explained, RFRA reflects Congress's confidence in "the ability of the federal courts to weed out insincere claims." *Hobby Lobby*, 134 S. Ct. at 2774, slip op. at 29. And the *Hobby Lobby* Court approvingly cited a number of cases where courts have inquired into the sincerity of religious claims. *Id.* at 2774 nn.28-29, slip op. at 29-30 nn.28-29 (citing *United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010); *Abate v. Walton*, 77 F.3d 488, 1996 WL 5320, at *5 (9th Cir. Jan. 5, 1996); *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996); *Green v. White*, 525 F Supp. 81, 83-84 (E.D. Mo. 1981); *Winters v. State*, 549 N.W.2d 819, 819-20 (Iowa 1996)). As the Supreme Court has previously stated: "[W]hile the truth of a belief is not open to question, there remains the significant question whether it is truly held. This is the threshold question of sincerity which must be resolved in every case." *United States v. Seeger*, 380 U.S. 163, 185 (1965) (internal quotation marks omitted). In short, in these religious freedom cases, the courts appropriately "inquir[e] into the sincerity" of a claimant's "professed religiosity." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (applying the related Religious Land Use and Institutionalized Persons Act).

Third, as explained more fully below, RFRA's compelling interest standard allows the Government to compel or proscribe action in certain circumstances even though, by doing so, the Government may be substantially burdening someone's religion.

"acceptable, logical, consistent, or comprehensible to others" in order to merit protection. *Thomas*, 450 U.S. at 714. As Justice Brennan, the primary architect of the body of religious freedom law now incorporated into RFRA, once put it: "[R]eligious freedom – the freedom to believe and to practice strange and, it may be, foreign creeds – has classically been one of the highest values of our society." *Braunfeld v. Brown*, 366 U.S. 599, 612 (1961) (Brennan, J., concurring in part and dissenting in part).

That bedrock principle means that we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs – including about complicity in wrongdoing. In *Hobby Lobby*, the Supreme Court emphatically confirmed that point. There, as here, the Government argued that the employers' alleged complicity in providing contraception did not infringe on the employers' religious beliefs. In particular, the Government claimed that "the connection between what the objecting parties must do" (pay for insurance) and "the end that they find to be morally wrong (destruction of an embryo)" was "simply too attenuated" because the end would occur only as a result of intervening decisions by individual covered employees. *Hobby Lobby*, 134 S. Ct. at 2777, slip op. at 35.

The Supreme Court adamantly rejected the basic premise of the Government's argument. The Court emphasized that federal courts have "no business" trying to answer whether the religious beliefs asserted in a RFRA case – including the complicity belief at issue in *Hobby Lobby* – are correct or reasonable. *Id.* at 2778, slip op. at 36. A federal court may not tell the

objectors that "their beliefs are flawed," and thus may not arrogate to itself "the authority to provide a binding national answer to this religious and philosophical question" of complicity. *Id.* at 2778, slip op. at 36-37 Instead, the "narrow function" of federal courts is to determine whether the belief is sincere and "reflects an honest conviction." *Id.* at 2779, slip op. at 37-38 (internal quotation marks omitted). In doing so, moreover, courts must keep in mind that RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" for purposes of the related Religious Land Use and Institutionalized Persons Act); *see id.* § 2000bb-2 (incorporating that Act's definition set forth in § 2000cc-5 into RFRA).

As a matter of religious belief, plaintiffs in this case say that the act of submitting the required form makes them complicit in moral wrongdoing. Importantly, no one here disputes that plaintiffs' religious belief is sincere and reflects an honest conviction. *Cf. Wheaton College v. Burwell*, 134 S. Ct. 2806, 2808, slip op. at 4 (2014) (Sotomayor, J., dissenting) ("The sincerity of Wheaton's deeply held religious beliefs is beyond refute."); *id.* at 2812, slip op. at 11. Therefore, plaintiffs' decision to decline to submit the required letter or form is an "exercise of religion" under RFRA. No one disputes, moreover, that plaintiffs will be required to pay huge monetary penalties if they do not submit the required form. Those large monetary penalties plainly represent a "substantial burden" on plaintiffs' exercise of religion. *See Hobby Lobby*, 134 S. Ct. at 2759, slip op. at 2.

Judge Flaum persuasively summarized the point in a similar case that involved Notre Dame: "Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame's understanding." *University of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S. Ct. 1528 (2015). Judge Pryor has likewise cogently explained: "So long as the [religious organization's] belief is sincerely held and undisputed – as it is here – we have no choice but to decide that compelling the participation of the [religious organization] is a substantial burden on its religious exercise." *Eternal Word Television Network, Inc. v. Secretary, Department of Health & Human Services*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., specially concurring).

In short, under *Hobby Lobby*, the regulations substantially burden plaintiffs' exercise of religion.

The panel opinion concludes, however, that there is no substantial burden on plaintiffs' exercise of religion. In particular, the panel opinion says that plaintiffs are wrong to think that they would be complicit in moral wrongdoing if they submit this form, as required by the Government. But to reiterate: Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do. *See Hobby Lobby*, 134 S. Ct. at 2778, slip op. at 36.

And *Hobby Lobby* was not the first Supreme Court case to say as much. *See Thomas*, 450 U.S. at 714-16.

The panel opinion responds that plaintiffs are simply misunderstanding the law and that the law, properly understood, does not actually make plaintiffs complicit in providing contraceptive coverage. But there is no dispute that the Government is requiring plaintiffs to submit a form (to the Government or to the insurer) or else pay a penalty. And there is no dispute that the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees. In other words, the form matters and plays a role in this scheme. After all, if the form were meaningless, why would the Government require it? The Government is requiring plaintiffs to submit the form precisely because the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees.[5] Plaintiffs in turn sincerely believe that submitting the form under those circumstances makes them complicit in wrongdoing in contravention of their religious beliefs. *See* Plaintiffs' Supplemental Br. 1. Compelling submission of the form therefore imposes a substantial burden under RFRA.[6]

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[5] If the form were meaningless, the Government presumably would not require it and perpetuate this rancorous dispute with religious organizations around the country.

[6] The panel's concurrence in the denial of rehearing en banc largely echoes Justice Sotomayor's dissent in *Wheaton College*. *Compare* Panel Concurrence at 5 ("In no respect do we, nor could we,

The panel opinion separately notes that the Government intended the form to accommodate religious organizations so that the organizations themselves would not have to provide contraceptive coverage. But the panel opinion has been faked out by the Government's accommodation. The accommodation provides an alternative, but the alternative itself imposes a substantial burden on the religious organizations' exercise of religion. Again, this case arises in a "Do X or Y or pay a penalty" posture. All agree that X – providing contraceptive coverage – infringes plaintiffs' exercise of religion. But so does Y – submitting the form. What the panel opinion misses is that submitting this form is *itself* an act that contravenes the organizations' sincere religious beliefs. It is no different from the recent *Holt* case, in which the

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question Plaintiffs' sincere beliefs about what their faith permits and forbids of them. But we can and must decide which party is right about how the law works."), *with Wheaton College*, 134 S. Ct. at 2812, slip op. at 10 (Sotomayor, J., dissenting) ("Wheaton is mistaken – not as a matter of religious faith, in which it is undoubtedly sincere, but as a matter of law Any provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations."). But the Supreme Court, by a 6-3 margin, did not agree with Justice Sotomayor's dissent in *Wheaton College*, at least for purposes of the injunction. The Court instead granted an injunction under the All Writs Act to Wheaton College, which the Court could do only if it concluded that the required form "indisputably" would impose a substantial burden on Wheaton College's exercise of religion. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *Wheaton College*, 134 S. Ct. at 2808, slip op. at 4 (Sotomayor, J., dissenting) (internal quotation marks omitted).

act that contravened the Muslim prisoner's sincere religious beliefs was shaving his beard. Submitting the form = shaving your beard. Or the *Yoder* case, in which the act that contravened the Amish parents' beliefs was sending their children to high school. Submitting the form = sending your children to high school. Or the *Lee* case, in which the act that contravened the Amish employer's religious beliefs was paying Social Security taxes. Submitting the form = paying the Social Security tax. Or the *Sherbert* case, in which the act that contravened the Seventh-day Adventist's belief was working on Saturday, the Sabbath day of the faith. Submitting the form = working on the Sabbath.

In all of those cases, the Supreme Court recognized that the act in question represented a sincere religious belief that the Government could not override except by employing the least restrictive means to further a compelling governmental interest. The same is true here. The panel opinion does not fully come to grips with that critical point, in my view.

The panel opinion therefore also does not appreciate that the substantial burden on plaintiffs' exercise of religion comes from the monetary penalty (which in this case happens to be huge) that the organizations will have to pay if they adhere to their religious beliefs and do not submit the required form. In *Holt*, the substantial burden came from the discipline the prisoner would receive if he refused to shave his beard. In *Yoder*, it was the $5 monetary fine for the parents whose children did not attend high school. In *Lee*, it was the monetary penalty for failure to pay taxes. In *Sherbert*, it was the denial of unemployment benefits for not working on the Sabbath.

The essential principle is crystal clear: When the Government forces someone to take an action contrary to his or her sincere religious belief (here, submitting the form) or else suffer a financial penalty (which here is huge), the Government has substantially burdened the individual's exercise of religion. So it is in this case.

To be clear, that conclusion does *not* mean that plaintiffs prevail on their RFRA claim. Rather, it means only that they prevail on the *first prong* of the three-part RFRA inquiry and that we now must move on to the second and third prongs. The Government may still be able to compel plaintiffs to submit the required form if the Government prevails on those second and third prongs. *Cf. Lee*, 455 U.S. at 257, 261 (Government may force Amish employer to pay Social Security taxes notwithstanding substantial burden on Amish employer's religion).

II

Second, does the Government have a compelling interest in facilitating women's access to contraception – in particular, in facilitating access to contraception for the employees of these religious organizations? *See* 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person* . . . is in furtherance of a compelling governmental interest.") (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (compelling interest test focuses on interest as applied to particular plaintiffs).

The plaintiff religious organizations strenuously argue that there is no such compelling governmental interest. As I see it, however, plaintiffs' argument

cannot be squared with the views expressed by a majority of the Justices in *Hobby Lobby*.

To begin with, how do we determine whether the Government has a "compelling interest" in overriding a fundamental constitutional or statutory right such as RFRA's right to religious freedom? Good question. No code or history book lists the Government's compelling interests. Rather, courts have developed those interests over time, in common-law-like fashion.[7] What we do know, to put it in colloquial and somewhat question-begging terms, is that the asserted governmental interest must be so critically important that it justifies overriding certain fundamental individual rights in certain circumstances. To quote the Supreme Court, the interest must be "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781, slip op. at 41 (2014). Examples of compelling interests from past Supreme Court cases include conducting the military draft, maintaining the tax system, running the Social Security program, and preventing discrimination against third parties. *See Gillette v. United States*, 401 U.S. 437, 461-63 (1971); *Hernandez v. Commissioner of*

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[7] The compelling interest nomenclature took root somewhat ignominiously in free speech cases as a way to justify the Government's suppression of Communist speech. *See, e.g.*, *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-52 (1961); *Barenblatt v. United States*, 360 U.S. 109, 126-27 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 265-67 (1957) (Frankfurter, J., concurring in result). In any event, the compelling interest override is now an established part of various constitutional doctrines, including the First and Fourteenth Amendments. And Congress expressly incorporated it into the Religious Freedom Restoration Act.

Internal Revenue, 490 U.S. 680, 699-700 (1989); *United States v. Lee*, 455 U.S. 252, 257-59 (1982); *Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983).[8]

In this case, we do not have to tackle the compelling interest question without guidance from above. Justice Kennedy strongly suggested in his *Hobby Lobby* concurring opinion – which appears to be controlling de facto if not also de jure on this particular issue – that the Government generally has a compelling interest in facilitating access to contraception for women employees. *Hobby Lobby*, 134 S. Ct. at 2785-86, slip op. at 2 (Kennedy, J., concurring); *see also id.* at 2779-80, slip op. at 39-40 (majority opinion); *id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977). In particular, Justice Kennedy referred to the "premise" of the Court's decision: namely, its "assumption" that the Government has a "legitimate and compelling interest" in facilitating access to contraception. *Hobby Lobby*, 134 S. Ct. at 2786, slip op. at 2 (Kennedy, J., concurring). Justice Kennedy's use of the term "compelling" in this context was no doubt carefully considered. And the four dissenting Justices likewise stated that the Government had a compelling interest

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[8] As noted above, at least three aspects of RFRA limit the statute's reach and thus help answer the parade of horribles sometimes raised in opposition to religious freedom claims. First, RFRA covers only *religious* objections. Second, *insincere* religious claims are excluded from RFRA's protection. Third, RFRA's compelling interest standard allows the Government to compel or proscribe action in certain circumstances even though, by doing so, the Government may be substantially burdening someone's religion.

in facilitating women's access to contraception. *Id.* at 2799-2801, slip op. at 23-27 (Ginsburg, J., dissenting).

It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception. About 50% of all pregnancies in the United States are unintended. The large number of unintended pregnancies causes significant social and economic costs. To alleviate those costs, the Federal Government has long sought to reduce the number of unintended pregnancies, including through the Affordable Care Act by making contraceptives more cheaply and widely available. It is commonly accepted that reducing the number of unintended pregnancies would further women's health, advance women's personal and professional opportunities, reduce the number of abortions,[9] and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age. In light of the numerous benefits that would follow from reducing the number of unintended pregnancies, it comes as no surprise that Justice Kennedy's opinion expressly referred to a "compelling" governmental interest in facilitating women's access to contraception.

In short, even if the Court did not formally hold as much, *Hobby Lobby* at least strongly suggests that the Government has a compelling interest in facilitating

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[9] As the panel opinion in this case accurately pointed out, as of now about 40% of all unintended pregnancies end in abortion.

access to contraception for the employees of these religious organizations.[10]

III

Third, in light of those two conclusions, we must consider the least restrictive means issue. When, as here, a law substantially burdens the exercise of religion, but the law furthers a compelling governmental interest, RFRA requires the Government to use the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Supreme Court has emphasized that the "least-restrictive-means standard is exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780, slip op. at 40 (2014).

Congress adopted the least restrictive means requirement to help thread the needle between two conflicting principles. The least restrictive means requirement, properly applied, allows religious beliefs to be accommodated *and* the Government's compelling interests to be achieved – a win-win resolution of these often contentious disputes. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. § 2000bb(a)(5)) (RFRA "'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'"). As a leading First Amendment scholar has put it: "If there's some way of

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[10] Justice Kennedy's *Hobby Lobby* opinion did not expressly discuss whether a compelling governmental interest in ensuring general coverage for contraceptives encompasses ensuring coverage for those specific drugs and services that, some believe, operate as abortifacients and result in the destruction of embryos.

granting an exemption and yet accomplishing the government's goal, then there's no real need to interfere with the religious practice, so the exemption must be granted." Eugene Volokh, *The First Amendment and Related Statutes* 986 (5th ed. 2014).

Requiring religious organizations to submit the form mandated by current federal regulations is not the Government's least restrictive means of furthering its interest in facilitating access to contraception for the organizations' employees. That is because the Government can still achieve its interest by allowing the religious organizations to submit the less restrictive notice that the Supreme Court has already *twice* indicated should be good enough to satisfy the Government's interest.

In the *Wheaton College* and *Little Sisters of the Poor* cases, the Supreme Court carefully specified that the religious organizations would satisfy their current legal obligations by submitting a simple notice to the Secretary of Health and Human Services "in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807, slip op. at 1 (2014); *see also Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022, slip op. at 1 (2014) (notice should be "in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services"); *cf. Eternal Word Television Network, Inc. v. Secretary, Department of Health & Human Services*, 756 F.3d 1339, 1349 (11th Cir. 2014) (Pryor, J., specially concurring) ("The United States, for

example, could require the [religious organization] to provide a written notification of its religious objection to the Department of Health and Human Services.").

By contrast to the form required by current federal regulations, the *Wheaton College/Little Sisters of the Poor* notice does not require the religious organizations to identify or notify their insurers, and thus (according to plaintiffs) lessens the religious organizations' degree of complicity in what they consider to be wrongful as a matter of religious belief. *See* Plaintiffs' Supplemental Br. 10. And even with the less detailed *Wheaton College/Little Sisters of the Poor* notice, the Government can independently determine the identity of the organizations' insurers and thereby ensure that the insurers provide contraceptive coverage to the organizations' employees. The *Wheaton College/Little Sisters of the Poor* notice may create some administrative inconvenience for the Government, because the Government itself will have to identify the religious organizations' insurers. But administrative inconvenience alone does not negate the feasibility of an otherwise less restrictive means – unless the administrative problem would be "of such magnitude" that it would render "the entire statutory scheme unworkable." *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963); *see also Bowen v. Roy*, 476 U.S. 693, 731 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[A]dministrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude.").

If a religious organization does not use the currently required form but instead uses the *Wheaton College/Little Sisters of the Poor* notice, how would that

affect third parties, namely the religious organizations' employees? That question matters because the Supreme Court has stated that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (applying the related Religious Land Use and Institutionalized Persons Act). In *Hobby Lobby*, the Court reiterated that this consideration "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37, slip op. at 42 n.37. As Justice Kennedy put it in his concurrence, the accommodation must not "unduly restrict other persons, such as employees, in protecting their own interests." *Id.* at 2787, slip op. at 4 (Kennedy, J., concurring).

But here, the religious organizations' employees would still receive the *same* insurance coverage from the *same* insurer for contraceptives. As the Supreme Court explained in its *Wheaton College* order: "Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives" or "precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." *Wheaton College*, 134 S. Ct. at 2807, slip op. at 1-2. So accommodating the religious organizations by allowing them to use the *Wheaton College/Little Sisters of the Poor* notice would not, to use Justice Kennedy's formulation, "unduly restrict" third parties. *Cf.* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and*

Politics, 124 Yale L.J., at 116 (forthcoming 2015) (version of Apr. 10, 2015) ("*Wheaton College*, like *Hobby Lobby*, appears to tie accommodation to the fact that the government has other ways of providing for the statute's intended beneficiaries so that no third-party harm would result from the accommodation.").

Although the Supreme Court's *Wheaton College* and *Little Sisters of the Poor* orders were not final merits rulings, they at least qualify as extremely strong signals from the Supreme Court about how to resolve the least restrictive means issue in this case. In particular, the Court in *Wheaton College* granted an injunction under the All Writs Act, which is appropriate "only where the legal rights at issue are indisputably clear." *Wheaton College*, 134 S. Ct. at 2808, slip op. at 4 (Sotomayor, J., dissenting) (internal quotation marks omitted). Moreover, the Court issued the *Wheaton College* order just days after its *Hobby Lobby* decision, and it did so over a detailed and forceful dissent.

In any event, regardless of whether we as a lower court are *formally* bound by the Supreme Court stay orders in *Wheaton College* and *Little Sisters of the Poor*, the notice identified by the Supreme Court in those two cases is undoubtedly a less restrictive way for the Government to further its interest than the form required by current federal regulations. It necessarily follows that the form required by current regulations is not the "least restrictive means" available to the Government. As the Supreme Court said a few months ago in a similar context: If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 135 S. Ct. 853,

864, slip op. at 11 (2015) (internal quotation marks omitted). So too here.

To be sure, some religious organizations claim that even the less restrictive *Wheaton College/Little Sisters of the Poor* notice still imposes a substantial burden on their religious beliefs. But that obviously does not help *the Government*'s argument in support of the current, even more burdensome form. The key point here is that the *Wheaton College/Little Sisters of the Poor* notice is less restrictive (that is, less burdensome) than the currently required form and yet still furthers the Government's compelling interest. Under RFRA, the Government therefore must employ that less restrictive means.[11]

Put simply, the Government need not – and therefore under RFRA may not – pursue its compelling interest in facilitating access to contraception by requiring religious nonprofit organizations to submit the form required by current federal regulations.[12]

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[11] The *Wheaton College/Little Sisters of the Poor* notice requires a religious organization to, in effect, raise its hand to opt out. But contrary to what the panel's concurrence in the denial of rehearing en banc says, *see* Panel Concurrence at 3-4 n.1, the currently required form requires a religious organization both to raise its hand *and* to point to its insurer. From the perspective of the plaintiff religious organizations, the currently required form is therefore more burdensome because it makes the organizations identify or notify their insurers, which the organizations believe makes them more complicit in the provision of contraceptive coverage to which they object as a matter of religious belief.

[12] As the Court in *Hobby Lobby* noted, the Government could directly subsidize or provide contraceptives to employees of religious non-profit organizations. *See Hobby Lobby*, 134 S. Ct. at

One final note for clarity: The Government may of course continue to require the religious organizations' *insurers* to provide contraceptive coverage to the religious organizations' employees, even if the religious organizations object. As Judge Flaum correctly explained, "RFRA does not authorize religious organizations to dictate the independent actions of third-parties, even if the organization sincerely disagrees with them." *University of Notre Dame v. Sebelius*, 743 F.3d 547, 567 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S. Ct. 1528 (2015). "That is true whether the third-party is the government, an insurer, a student, or some other actor." *Id.* "So long as the government does not require" religious organizations themselves "to take action, RFRA does not give" the religious organizations "a right to prevent the government from providing contraceptives to" the religious organizations' employees. *Id.*

* * *

2780-81, slip op. at 41. The direct funding option raises certain feasibility issues. A means that is not a reasonably feasible way of furthering the Government's interest cannot be deemed a less restrictive means of furthering that interest. In *Little Sisters of the Poor*, *Hobby Lobby*, and *Wheaton College*, the Court did not say that direct funding was the least restrictive means of furthering the Government's interest. If it had, then even the *Wheaton College/Little Sisters of the Poor* notice would itself be too restrictive. In any event, what matters in the present case is that the *Wheaton College/Little Sisters of the Poor* notice is less restrictive than the form required by the current federal regulations but still achieves the Government's interest.

In sum, I respectfully would grant rehearing en banc and rule for the plaintiff religious organizations on the ground that the *Wheaton College/Little Sisters of the Poor* notice is a less restrictive way than the currently mandated form for the Government to achieve its compelling interest in facilitating access to contraception for the organizations' employees.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2013
No. 13-5368
1:13-cv-01261-EGS

[Filed December 31, 2013]

Priests for Life, et al.,
Appellants

v.

United States Department of Health and Human Services, et al.,
Appellees

No. 13-5371
1:13-cv-01441-ABJ

Roman Catholic Archbishop of Washington, et al.,
Appellants
Thomas Aquinas College,
Appellee

v.

Kathleen Sebelius, et al.,
Appellees

BEFORE: Henderson, Tatel*, and Brown, Circuit Judges

ORDER

Upon consideration of the emergency motion for injunction pending appeal in No. 13-5368, the response, the reply, and the Rule 28(j) letters; the emergency motion for injunction pending appeal in No. 13-5371, the response, the reply, and the Rule 28(j) letters, it is

ORDERED that the motions for injunction pending appeal be granted. Appellants have satisfied the requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2013). Appellees are enjoined from enforcing against appellants the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court. It is

FURTHER ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that appellants in these consolidated cases show cause by January 14, 2014, why they should not be required to file one joint opening brief limited to 14,000 words and one joint reply brief limited to 7,000 words. The parties are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words

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* Judge Tatel would deny the emergency motions for injunction pending appeal for the reasons in the attached statement.

not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide *detailed* justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

TATEL, *Circuit Judge*: Appellants challenge a section of the Affordable Care Act that requires certain religious organizations to "self certify" their religious objections to the provision of contraceptive services in order to escape the Act's requirement that they provide such services to their employees. Because I believe that Appellants are unlikely to prevail on their claim that the challenged provision imposes a "substantial burden" under the Religious Freedom Restoration Act (RFRA), I would deny their application for an injunction pending appeal. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (denying injunction pending appeal); *University of Notre Dame v. Sebelius*, No. 13-1540 (7th Cir. Dec. 30, 2013) (same). Simply put, far from imposing a "substantial burden" on Appellants' religious freedom, the challenged provision allows

Appellants to avoid having to do something that would substantially burden their religious freedom.

Of course, if Appellants were correct that the challenged provision requires them to engage in acts that "affirmatively authorize" and "trigger[]" contraceptive coverage, PFL Mot. 2, 7, then I would agree that we should grant an injunction pending appeal. 42 U.S.C § 2000bb-1(a)-(b); *Gilardi v. Department of Health and Human Services*, No. 13-5069, slip op. at 21–23 (D.C. Cir. Nov. 1, 2013). But that is not how the challenged provision operates. As the government points out, the Affordable Care Act requires employers and insurers to provide health plans that include contraceptive coverage. *See* 29 C.F.R. 2590.715–2713(a)(1)(iv); PFL Opp. 3–5. Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify. Insofar as Appellants argue that they are burdened by authorizing their third-party administrator to provide contraceptive coverage, the government has conceded that the contraceptive mandate cannot be enforced against third-party administrators of church plans, and Appellants have provided no reason for us to believe that the Catholic Archdiocese of Washington's plan, Appellants' third-party administrator, will provide such coverage. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441, slip op. at 46–51 (D.D.C. Dec. 20, 2013); *see also Little Sisters of the Poor Home for the Aged* at 2–3. In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to

Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.

Appellants also argue that they are burdened simply by participating in a "scheme" in which contraceptive services are provided. *See* PFL Reply 4; Archbishop Reply 6. Although we must accept Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are

required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs. Nothing in RFRA empowers such organizations to leverage their own minimal interaction with the government to force the government to act in conformance with their religious beliefs—however sincerely held.